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In The

Supreme Court of the United States

October Term, 1996

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, et al.,

Petitioners,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

DECOTIIS, FITZPATRICK & GLUCK
Attorneys for Petitioners
Essex County Utilities Authority
Hudson County Improvement Authority
Mercer County Improvement Authority
Passaic County Utilities Authority
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
(201) 928-1100

J. SHELDON COHEN
Of Counsel
BENJAMIN CLARKE
J. SHELDON COHEN*
On the Brief

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Where the State, exercising its police powers, has determined to regulate the solid waste industry as a utility, and has accordingly established waste flow directives for its governmental subdivisions and their contractors, are those directives subject to heightened scrutiny under the dormant Commerce Clause, *see C & A Carbone, Inc. v. Town of Clarkstown* ("*Carbone*"), 511 U.S. 383 (1994) (subjecting a municipal waste flow ordinance to heightened scrutiny), or to ordinary scrutiny, *see General Motors Corp. v. Tracy*, 519 U.S. ___, 117 S. Ct. 811, 136 L. Ed. 2d 761, 784 (1997) (applying balancing test in a utility context, and reaffirming the "continuing importance of the State's interest in protecting . . . captive market[s]")?

2. Should the Court exercise its supervisory powers to resolve the conflicts that exist among the Circuits regarding the scope and force of the holding in *Carbone*?

LIST OF PARTIES

In the proceedings below, Atlantic Coast Demolition & Recycling, Inc. was the plaintiff in the first-filed action (Civil Action No. 93-2669 (JEI)) and named as parties-defendants the Board of Chosen Freeholders of Atlantic County, the Atlantic County Utilities Authority, the Board of Chosen Freeholders of Camden County, the Pollution Control Financing Authority of Camden County and Scott A. Weiner, in his capacity as then Commissioner of the Department of Environmental Protection and Energy ("State" or "Department")[1]. All defendants except the Department agreed not to participate in the proceedings and agreed to be bound by the determination in consideration of which the plaintiff would not seek counsel fees against them pursuant to 42 U.S.C. § 1988. In the district court, the Mercer County Improvement Authority and the Gloucester County Improvement Authority were granted leave to appear as *amicus curiae*

On leave of the Court of Appeals for the Third Circuit, the following county authorities appeared as *amici curiae:* Hudson County Improvement Authority, Passaic County Utilities Authority, Essex County Utilities Authority, Mercer County Improvement Authority and Cape May County Municipal Utilities Authority. The Pennsylvania Department of Environmental Resources also was granted *amicus curiae* status.

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[1] During the course of these proceedings, the Department of Environmental Protection and Energy was reorganized and denominated the Department of Environmental Protection.

LIST OF PARTIES – Continued

Upon remand from the Court of Appeals, the *Atlantic Coast* proceeding was consolidated with Civil Action No. 94-3244 (JEI) filed by plaintiffs below C & A Carbone, Inc., Mayor Brett Schundler of the City of Jersey City, Mayor John Rooney of the Borough of Northvale, Mayor Dwight DeStefan of the Township of River Vale, the City of Passaic, the City of Paterson, the new Jersey Chapter of the National Solid Waste Management Association, and the Waste Management Association of New Jersey (hereinafter referred to as *Carbone II*). The named defendants in *Carbone II* were Robert C. Shinn, Jr., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection and Energy, the New Jersey Department of Environmental Protection and Energy, Larry J. McClure, individually and in his capacity as Executive Director of the Bergen County Utilities Authority, the Bergen County Utilities Authority, Mark Guarino, individually and in his capacity as Director of the Bergen County Health Department, the Bergen County Health Department, Kenneth Blane, individually and in his capacity as Executive Director of the Hudson County Improvement Authority, the Hudson County Improvement Authority, Carol Ann Wilson, individually and in her capacity as Director of the Hudson County Health Department, William P. Schuber, individually and in his capacity as County Executive for Bergen County, Robert C. Janiszewski, individually and in his capacity as County Executive for Hudson County, Passaic County Utilities Authority, Anthony Ross, individually and in his

LIST OF PARTIES – Continued

capacity as Executive Director of the Passaic County Utilities Authority, and Nicola R. DiDonna, individually and in his capacity as County Executive of the County of Passaic.

On leave of the district court, the Hudson County Improvement Authority, the Passaic County Utilities Authority, the Essex County Utilities Authority, the Mercer County Improvement Authority, the Cape May County Municipal Utilities Authority, and the Camden County Energy Recovery Associates, L.P., were allowed to intervene as defendants in the consolidated cases. By order entered on June 9, 1995, the various municipal plaintiffs in *Carbone II* were dismissed from the case.

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CITATIONS OF OPINIONS BELOW

The Third Circuit's initial decision, reversing an unreported decision of the District Court, is reported at 48 F.3d 701. The District Court's decision on remand is reported at 931 F. Supp. 341. The Third Circuit's final decision is reported at 112 F.3d 652.

STATEMENT OF JURISDICTION

This matter arises from a final judgment of the United States Court of Appeals for the Third Circuit dated May 1, 1997. A petition for rehearing was denied on June 5, 1997. Jurisdiction exists under 28 U.S.C. §§ 1254, 2350.

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8, cl. 3, of the Constitution of the United States provides, "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian tribes."

STATEMENT OF THE CASE

I. Background

In New Jersey, throughout the 1950's and 60's, organized crime cartels dominated the market for solid waste disposal. *See Trade Waste Management Ass'n v. Hughey*, 780 F.2d 221, 223-24 (3d Cir. 1985); *State v. Trade Waste Ass'n*,

96 N.J. 8, 472 A.2d 1050 (1984). During this same time period, available landfill space dwindled to a vanishing point. Environmental awareness grew in inverse proportion.

With time, these forces gained strength, one from the other. The scarcity of landfill space made it easier for the cartels to control and exploit the disposal market. It also made illegal dumping more attractive, and, since the cartels lived outside the law, they succumbed to that temptation rather readily. Discovery of widespread illegal dumps, in turn, heightened environmental concerns among the public.

In 1970, the New Jersey Legislature responded by enacting two solid waste statutes, the Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.* ("the Management Act"), and the Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 *et seq.* ("the Utility Act"). The statutes, in combination, replaced the privately rigged disposal market with a publicly operated one, under which state and local authorities were empowered to exercise tight horizontal and vertical controls over all solid waste activities.

Horizontally, the Management Act divided the State into 22 "solid waste management districts," each to be supervised by a local authority with responsibility for developing a solid waste management plan for the district. Vertically, the Management Act charged the State Department of Environmental Protection with reviewing and approving the solid waste management plan for each district, N.J. Stat. Ann. 13:1E-20, and the Utility Act

charged the State Board of Public Utilities with regulating solid waste rates. N.J. Stat. Ann. 48:13A-2.

During the 1980's, the legality of New Jersey's state-controlled waste system was challenged on several separate grounds and occasions. *See A.A. Mastrangelo, Inc. v. Commissioner of Dep't of Envtl. Protection*, 90 N.J. 666, 449 A.2d 516 (1982) (raising state law challenges); *Trade Waste Management Ass'n, Inc. v. Hughey*, 780 F.2d 221 (3d Cir. 1985) (raising First Amendment challenges); *J. Filiberto Sanitation, Inc. v. Department of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988) (raising Commerce Clause challenges). Each challenge was rejected in turn, allowing the State to secure its hold on the solid waste market.

The cost of government supersedure has been high; public investment in solid waste infrastructure has exceeded $2 billion over the past two decades. The benefits, however, have been substantial. As found below by the District Court: "Over the last three decades, New Jersey has developed a system of waste management that brought the State from a crisis situation to one in which waste is disposed of efficiently and with a minimal negative impact on the environment." 931 F. Supp. at 346.

II. Proceedings Below

In June 1993, respondent Atlantic Coast Demolition & Recycling Inc., a Pennsylvania corporation that processes construction and demolition debris, filed suit in the District of New Jersey, challenging New Jersey's solid waste laws on Commerce Clause grounds. The District Court (Hon. Joseph E. Irenas, U.S.D.J.), by decision dated February 28, 1994, dismissed the suit, largely on the strength of

the Third Circuit's earlier decision in *Filiberto, supra*. Cognizant of the unique solid waste problems posed by New Jersey's population density, and recalling the State's troubled solid waste history, the District Court concluded that "legitimate local concerns far outweigh any negative impact on interstate commerce." (App. 85).

Atlantic Coast appealed. During the pendency of the appeal, this Court issued its decision in *Carbone*, striking down a municipal waste flow ordinance that the Court found to be "just one more instance of local processing requirements that we have long held invalid." 511 U.S. at 391. Based on *Carbone*, the Third Circuit reversed the District Court's dismissal of Atlantic Coast's complaint. 48 F.3d 701. The Court of Appeals concluded that "New Jersey's flow control regulations accomplish on a district level substantially what Clarktown's flow control ordinance accomplished on a local level," 48 F.3d 713, and ruled that their validity must therefore be assessed under strict scrutiny standards. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (describing the heightened scrutiny test under the Commerce Clause as a "virtually per se rule of invalidity"). The Third Circuit remanded the case to the District Court for findings on that score.

The District Court, on remand, held that, under a strict scrutiny analysis, "New Jersey's system of flow control of waste violates the Commerce Clause." 931 F. Supp. at 358. The District Court reaffirmed its previous finding that the State's regulations served a "valid local purpose," *id.* at 354, but determined that the State had "not met its burden of demonstrating an absence of feasible nondiscriminatory alternatives" to its system. *Id.* The

court further found that development of "the right combination of alternatives to develop a new system will require extensive planning," *id.* at 357, and for that reason stayed its decision "for two years following the date on which this case is no longer subject to the right to appeal." *Id.* at 358.

All parties appealed. On appeal, the Third Circuit affirmed the District Court's determination that the State's waste flow regulations were unconstitutional, but reversed the lower court's issuance of a post-appeal stay. 112 F.3d at 667-668. The Court of Appeals "sympathize[d] with the State defendants to the extent that local and state officials understandably presumed New Jersey's flow control laws to be constitutional when they issued bonds to build the local waste disposal facilities," *id.* at 666, but held that the prospect of financial hardship faced by the State and local authorities, "cannot justify discrimination against interstate commerce." *Id.*

The Third Circuit also reaffirmed its view that *Carbone* does not "establish a per se rule subjecting all flow control ordinances to strict scrutiny." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 800 (3d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1265, 134 L. Ed. 2d 213 (1996). In accordance with that interpretation of *Carbone*, the Court stated:

> Although the State of New Jersey may no longer preclude the designation of out-of-state waste disposal facilities [1], . . . the State and the

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[1] The court's statement that the State may "no longer preclude the designation of out-of-state waste disposal

> County Authorities remain free to regulate the flow of waste within New Jersey so long as the State's laws and regulations treat in-state and out-of-state facilities equally. [citation omitted]

112 F.3d at 669. In acknowledgment of the "weighty issues" raised by the case, the Court of Appeals stayed its decision pending further appeal. 112 F.3d at 673.

The court thereafter denied the State's petition for rehearing.

SUMMARY OF ARGUMENT

New Jersey's solid waste laws and regulations arose out of a pressing local need to replace a virulently dysfunctional market. The replacement system bears the usual hallmarks of state regulation – increased bureaucracy, compromised efficiency – but is by every measure superior to what preceded it. The dormant Commerce Clause does not prevent States from acting to protect the health, safety and welfare of their citizens when private markets fail to do so, and in particular does not prevent State takeover of a malfunctioning market by resort to utility regulation. Carbone does not speak to that situation, and in finding it to be controlling here, the Third Circuit erred. *See* Point I. In structure and effect, New Jersey's system of solid waste utility regulation much

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facilities" conflicts with its recognition elsewhere that the State's informal "self-sufficiency" policy did not preclude contracts with out-of-state facilities and operators. *See* 112 F.3d at 658 (noting the non-preclusive force of the State's informal "self-sufficiency" policy).

more closely resembles the state utility systems analyzed and vindicated in *Tracy, supra,* and in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U.S. 329 (1951).

With $1.75 billion in public bonds hanging in the balance, New Jersey must now, under the Third Circuit's decision, refashion its solid waste laws to conform to that court's interpretation of *Carbone*. Since, however, the Third Circuit's interpretation of *Carbone* is in conflict with other Circuits, New Jersey and its citizens will remain at substantial risk, no matter what policy choice the State makes in modifying its utility system. In view of the widespread disagreement over the meaning and scope of *Carbone*, and in view of the outsize fiscal – and public welfare – stakes, the Court should exercise its supervisory powers to clarify the boundaries of the limitations that the dormant Commerce Clause imposes on States in regulating utility systems and solid waste disposal. *See* Point II.

ARGUMENT

POINT I

THE COURT OF APPEALS MISCONSTRUED *CARBONE* IN HOLDING NEW JERSEY'S SOLID WASTE UTILITY REGULATIONS TO BE SUBJECT TO STRICT SCRUTINY UNDER THE DORMANT COMMERCE CLAUSE.

Born in crisis, New Jersey's solid waste laws represent a measured governmental response to real and persistent failures of the local waste disposal market. The

findings below amply demonstrate that, as the Third Circuit temperately phrased it, "New Jersey has one of the most serious and complex solid waste problems in the country." 48 F.3d at 718. New Jersey's solid waste laws follow a model used in many other States when faced with a need to secure the supply of services vital to the public interest in the face of a malfunctioning market: it declared all solid waste collection and disposal operators in the State, both public and private, to be public utilities, and regulated them as such. *See* N.J. Stat. Ann. 13:1E-2; N.J. Stat. Ann. 48:13A-2.

In 1988, called upon to review the validity of New Jersey's waste laws under the dormant Commerce Clause, the Third Circuit had little difficulty in upholding them. *Filiberto*, 857 F.2d at 913. Applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court found neither discriminatory purpose nor effect in New Jersey's solid waste utility system. 857 F.2d at 922. Seven years later, reviewing the same regulatory system, the Court reversed itself, finding that this Court's decision in *Carbone* required that the system be evaluated under "heightened scrutiny" standards. 48 F.3d at 717-718.

In so ruling, the Court found the public utility features of New Jersey's system to be of no import. The Court expressly rejected the State's reliance upon *Panhandle*, in which the Court upheld a state utility commission's efforts to protect a local gas company's franchise by prohibiting out-of-state companies from making direct sales to local industrial customers, and stated: "It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility. . . . [T]he statute . . . does not

distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility." 341 U.S. at 336-337.

Before the Third Circuit, petitioners argued that the gas utility system upheld in *Panhandle* was, in its material respects, indistinguishable from New Jersey's solid waste utility system. As was true in *Panhandle* with respect to gas distribution, New Jersey issues certificates of public convenience and necessity to regulated solid waste utilities, which must serve all customers in the franchise area or district, and not just the profitable or "cream" accounts. *See Panhandle*, 341 U.S. at 334. Also, analogously to *Panhandle*, out-of-state vendors are not prevented from supplying waste processing services to the local market as long as they operate through the certificated franchisee. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117, 127-128 (1978) (rejecting the notion that the Commerce Clause protects any particular structure or method of operating in a retail market).

Despite these pronounced likenesses, the Court of Appeals found *Panhandle* to be "not helpful here- . . . because it was decided before *Arkansas Electric [Cooperative Corp. v. Arkansas Pub. Services Comm.*, 461 U.S 375 (1983)]." 48 F.3d at 714. The Court thus viewed *Panhandle* to have been effectively overruled by *Arkansas Electric*, and went so far as to state, "[I]t well may be that the heightened scrutiny test would [now] be applied to a situation like that presented in *Panhandle.*" *Id.*

In finding *Panhandle* to be a dead letter, the Court of Appeals plainly erred, as this Court's recent decision in *Tracy, supra*, makes clear. In *Tracy*, the Court upheld a

sales and use tax imposed by Ohio on natural gas suppliers. 117 S. Ct. at 830. The State Supreme Court had determined that local gas distribution companies ("LDC's"), which were regulated as utilities under state law and were thus required to serve high and low volume customers, were exempt from the tax. *See Chrysler Corp. v. Tracy*, 73 Ohio St.3d 26, 652 N.E.2d 185 (1995). General Motors, a high volume purchaser of natural gas from out-of-state suppliers, asserted on certiorari that the taxes were therefore discriminatory under the dormant Commerce Clause, because only LDC's received the exemption. 117 S. Ct. at 818.

Writing for the Court, Justice Souter rejected this argument. The Court extensively and repeatedly cited to *Panhandle*, thus signalling its vitality. *Id.* at 827. Recounting the market conditions that had given rise to the need for utility regulation of the gas industry – conditions that had led the judiciary consistently to uphold State regulations, despite their undeniable effect on interstate commerce – the Court stated that the cycle of "wasteful competition," price wars, company failures, massive consolidation and monopolistic pricing amply justified State preemption of the private market: "[C]ompetition would simply give over to monopoly. . . . It seemed virtually an economic necessity for States to provide a single, local franchise . . . free of competition from any source within or without the State . . . balanced by regulation and the imposition of obligations to the consuming public upon the franchised retailers." 117 S. Ct. at 820.

Most importantly here, the Court in *Tracy* reaffirmed that, under *Arkansas Electric*, the validity of state utility

regulations will usually be determined by a flexible balancing test that looks "to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in commerce' . . . 'to determine whether States have a sufficient interest in regulating . . . within their borders.' " 117 S. Ct. at 820 n.8 (quoting *Arkansas Electric).* Stating that *Arkansas Electric* simultaneously "expanded both the permissible scope of state utility regulation and judicial recognition of the important state interests in such regulation," *id.*, the Court stressed, "Nothing in *Arkansas Electric* undermines the earlier cases' recognition of the powerful state interest in regulating sales to domestic consumers." *Id.*

Dispelling doubts about the "continuing importance of the States' interest in protecting the captive market" for natural gas, the Court wrote that the importance of that interest

> is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. . . . We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was 'never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'

117 S. Ct. at 828 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960)).

The present case points out a latent, but nationally significant, conflict in the Court's recent dormant Commerce Clause decisions – specifically, a conflict between *Carbone* and *Tracy*, Where, as in New Jersey, a State has chosen to regulate the solid waste industry as a utility, no sound doctrinal reason exists to impose one level of scrutiny, strict scrutiny, on waste flow regulations, and another level of scrutiny, ordinary scrutiny, on gas flow regulations. Waste disposal and gas supply are equally articles of interstate commerce, and the public is an equally captive market for both types of services.

While *Tracy* makes clear that state utility regulations are not "immune from our ordinary Commerce Clause jurisprudence," 117 S. Ct. at 820 n.8, it also makes clear that granting of an exclusive franchise to a utility will not, in the usual case, draw heightened scrutiny. If that is so – and *Tracy* seems to leave no room for contrary argument – then the citizens of New Jersey have been dealt a judicial error of mammoth proportions by the Third Circuit. *Compare Filiberto, supra,* (upholding New Jersey's waste regulations using ordinary level of scrutiny) with *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, et al.*, 112 F.3d 652, 673 (3rd Cir. 1997) (striking them down using strict scrutiny).

Petitioners respectfully urge the Court to review and correct the Third Circuit's mis-application of *Carbone*, and to reconcile the present incompatible reasoning of *Carbone* and *Tracy*. Certiorari should be granted to resolve this important inconsistency, and to prevent future harm to state utility systems through over extension of *Carbone*.

POINT II

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE POST-*CARBONE* CASE LAW IS IN SUBSTANTIAL CONFLICT AND CALLS FOR EXERCISE OF THE COURT'S SUPERVISORY POWERS.

In the wake of *Carbone*, courts throughout the country have been confronted, if not inundated, with dormant Commerce Clause challenges to state and local solid waste programs. To date, nothing remotely approaching a consensus on *Carbone*'s meaning and effect has been reached. Rather, with almost coin-toss randomness, lower courts have reached inconsistent results on relatively interchangeable facts.

At the heart of the disagreement is the question of whether *Carbone* categorically prohibits waste flow regulations, *see, e.g., Condon v. Andino, Inc.*, 961 F. Supp. 323, 330 (D.Me. 1997) (opining that it was the "act of granting and enforcing an exclusive franchise to a local waste processor" that "primarily concerned" the Court in *Carbone*), or whether it merely prohibits some forms of waste flow regulations. *See, e.g., National Solid Waste Management Ass'n v. Williams*, 966 F. Supp. 844, 852 (D. Minn. 1997) (holding that *Carbone* does not prohibit waste flow directives where the "State, through its subdivisions, acts as a market participant in the collection management of waste").

New Jersey's present dilemma well illustrates the seriousness of the problem posed by the prevailing uncertainty over *Carbone*. The Third Circuit, while striking down New Jersey's established waste flow system, expressly noted that, under its reading of *Carbone*, the

State is free to revive the system as long as it adheres to non-discriminatory procurement procedures. *Atlantic Coast*, 112 F.3d at 670; *accord Harvey*, 68 F.3d at 802 (holding that *Carbone* does not prohibit waste flow control regulations that are implemented through a non-discriminatory procurement process; "We believe . . . that a local authority could choose a single provider – without impermissibly discriminating against interstate commerce – so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses.")

Courts in other circuits, however, disagree with this reading of *Carbone*. In *Condon*, for instance, a District Court recently invalidated a municipal waste program that would likely have passed muster under the Third Circuit's standards, since the program was implemented through a non-discriminatory public bidding process. 961 F. Supp. at 330. The District Court in *Condon* found the neutral procurement process to be of little constitutional import. *Id.* (dismissing "the fact that there is a bidding process for all interested in obtaining the exclusive right to process waste generated within" the municipality). *Cf. Ben Ohrleins and Sons and Daughters, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) (taking note of the Third Circuit view, but declining to embrace or reject it).

Both readings of *Carbone* cannot be right. After all that has gone before, New Jersey should not be forced to see its $2 billion investment in waste disposal infrastructure used as a test case yet again. Nor should any other State or local body be put to such a risk.

The depth of the reigning confusion is perhaps best exemplified by the Second Circuit's decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996). In that case, the Second Circuit struck down an ordinance that required all municipal waste to be disposed of at a town-designated facility, but simultaneously upheld a series of municipal contracts that, in combination, required all residential waste in the municipality to be disposed of at a town-designated facility. As to the contracts, the court applied the "market participant" doctrine, *see Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and thereby finessed *Carbone. Smithtown*, 66 F.3d 515-16.

In *Smithtown*, the Second Circuit recognized that its decision created a split in the circuits, since the Eleventh Circuit had, in indistinguishable circumstances, declined to uphold a collection and disposal contract under the "market participant" doctrine. *See Waste Recycling v. South Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom. Waste Recycling v. SEAC Solid*, 29 F.3d 641 (11th Cir. 1994). The court also seemed well aware that the two municipal actions under review had little if any practical difference in their impact on interstate commerce, and that it was thus resting its decision on matters of form rather than substance. *Compare Pine Ridge Recycling, Inc. v. Butts County, Georgia*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (holding that public ownership of a designated facility does not deflect the

force of *Carbone*; "such a distinction would focus on form and ignore substance").[2]

In addition to the cloudy interface between the "market participant" doctrine and *Carbone*, another important point of uncertainty is whether "economic flow control," *i.e.*, the creation of economic incentives to encourage disposal of waste at a designated facility, presents a safe harbor from the strictures of *Carbone*. The Second Circuit so held in *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996) (upholding a municipal waste program under which the town offered free disposal at its designated incinerator to the contractor holding the exclusive town franchise for commercial waste disposal). However, such measures have been found in other cases to run afoul of the principles of *West Lynn Creamery v. Healy*, 512 U.S.186, 114 S. Ct. 2205 (1994), in which the Court struck down a facially neutral tax that operated, in combination with a separate subsidy program, to discriminate against out-of-state concerns. *See Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp.

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[2] Despite the general reluctance of courts to resolve issues of constitutional magnitude on mere formalities, *see, e.g., Pine Ridge, Smithtown* has engendered some support outside the Second Circuit. *See Barker Brothers Waste, Inc. v. Dyer County Legislative Body*, 923 F. Supp. 1042, 1055 (W.D. Tenn. 1996) (following *Smithtown*; upholding a regional authority's award of an exclusive waste disposal contract, despite authority's explicit consideration of contractor's commitment to use local landfill); *Williams*, 966 F. Supp. at 852 (upholding, on the basis of *Smithtown*, a statute requiring all contractors hired by public authorities to dispose of waste in conformance with county solid waste plans).

152, 156 (D. Conn. 1995) (striking down a town's fee that discouraged the use of other facilities).

At every point on the *Carbone* compass, opposing cases beckon the needle. State and local lawmakers stand pinned in the middle, committed to their historical duty to govern in this area, but unable to find true north. The prevailing uncertainty, while a boon for practitioners, imperils the resources of all other affected constituencies – taxpayers, ratepayers, bondholders, waste concerns, and (not least) courts alike. Without further guidance from the Court, the costly random walk will continue. As the dormant Commerce Clause's guardian, the Court has a special duty to monitor the impact of its decisions in this area. *See generally Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. ___, 117 S. Ct. ___, 137 L. Ed. 2d 852, 877 (1997) (Scalia, J., dissenting). A survey of the post-*Carbone* landscape yields one, and only one, clear conclusion: in the area of state and local waste programs, the dormant Commerce Clause is rampaging, and is inflicting substantial harm on an innocent public.[3]

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[3] It is noteworthy, and somewhat troubling that, at the same time that the Court has found the "dormant" Commerce Clause to impose new limitations on the traditional police powers of state and local governments, *Carbone, supra; Camp Newfound, supra*, it has also found Congress' commerce powers to be less expansive than had previously been thought. *United States v. Lopez*, 514 U.S. 549 (1995). In combination, these two lines of cases appear to give the federal judiciary a *Lochner*-esque breadth of review over state and federal legislation. Cf. W. Eskridge, Jr., and P. Frickey, *Law as Equilibrium*, 108 Harv. L. Rev. 26, 51-52 (1994) (criticizing *Carbone*, in part because "the Court does not have a coherent theory of what is unacceptable" under the dormant Commerce Clause).

New Jersey, with good cause, has invested heavily in its solid waste utility system. If its outstanding $1.75 billion in bonded debt must be restructured – and the Third Circuit's decision leaves default or restructuring as the only options[4] – the cost of the restructuring should at least be a one-time expense. Review of the decision below will afford New Jersey, and its numerous similarly situated sister States, the guidance that is so conspicuously lacking in the current case law, and will cut short the burgeoning, and rudderless, spate of Commerce Clause challenges to state and local waste programs. A writ of certiorari should accordingly issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DeCotiis, Fitzpatrick & Gluck
Attorneys for Petitioners

By: J. Sheldon Cohen
Benjamin Clarke

[4] Because of the financial and regulatory disruptions posed by the Third Circuit's decision, the State also petitions for certiorari to review the question of whether the Court of Appeals erred in vacating the District Court's post-appeal stay. Petitioners fully support and join in the State's petition on that point.

No. 97-400 SEP - 3 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ESSEX COUNTY UTILITIES AUTHORITY,
HUDSON COUNTY IMPROVEMENT AUTHORITY,
MERCER COUNTY IMPROVEMENT AUTHORITY,
PASSAIC COUNTY UTILITIES AUTHORITY, et al.,

Petitioners,

v.

ATLANTIC COAST DEMOLITION
& RECYCLING, INC., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DECOTIIS, FITZPATRICK & GLUCK
Attorneys for Petitioners
Essex County Utilities Authority
Hudson County Improvement Authority
Mercer County Improvement Authority
Passaic County Utilities Authority
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
(201) 928-1100

J. SHELDON COHEN
Of Counsel
BENJAMIN CLARKE
J. SHELDON COHEN*
On the Brief

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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APPENDIX TO PETITION

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APPENDIX A

ATLANTIC COAST DEMOLITION & RECYCLING, INC. Appellant,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY; Atlantic County Utilities Authority; Board of Chosen Freeholders of Camden County; Pollution Control Financing Authority of Camden County; Scott Weiner, individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy.

No. 94-5173.

United States Court of Appeals,
Third Circuit.

Argued Sept. 13, 1994.

Decided Feb. 16, 1995.

Sur Petition for Rehearing March 28, 1995.

Pennsylvania operator of transfer station and recycling center for construction and demolition debris brought action asserting Commerce Clause challenge to constitutional validity of New Jersey solid waste regulatory scheme. The United States District Court for the District of New Jersey, Joseph E. Irenas, J., entered judgment against operator, and operator appealed. The Court of Appeals, Stapleton, Circuit Judge, overruling *J. Filiberto Sanitation*, 857 F.2d 913, held that: (1) New Jersey's waste flow control regulations, requiring that residual waste from mixed waste loads be returned to each waste district's designated facility unless facility was compensated for lost waste revenue, favored district's designated

facilities at expense of out-of-state providers of processing and disposing services, thus discriminating against interstate commerce and, therefore, heightened scrutiny test, rather than mere balancing test, was applicable under dormant commerce clause analysis; (2) fact that New Jersey had not placed absolute bar on utilization of out-of-state facilities as designated facilities did not transform fundamentally discriminatory scheme into nondiscriminatory one; (3) fact that waste flow regulations were part of larger utility regulation system did not exempt them from heightened scrutiny test; and (4) waste flow regulations were not protected from dormant commerce clause scrutiny under market participant exception.

Reversed and remanded.

Mark R. Rosen (argued), Jodi Isenberg, Mesirov, Gelman, Jaffe, Cramer & Jamieson, Haddonfield, NJ, for appellant.

James J. Ciancia, Acting Atty. Gen., Andrea M. Silkowitz, Asst. Atty. Gen., Gail M. Lambert (argued), Stefanie A. Brand, Deputy Attys. Gen., Newark, NJ, for appellee Scott Weiner.

William J. Linton, Atlantic County Utilities Authority, Pleasantville, NJ, for appellee Atlantic County Utility Authority.

Frederick J. Schuck, Camden, NJ, for appellee Bd. of Chosen Freeholders of Camden County.

Jonathan L. Williams, J.S. Lee Cohen (argued), Michael S. Caro, DeCotiis, Fitzpatrick & Gluck, Hackensack, NJ, for amici curiae Hudson County Improvement Authority, Passaic County Utilities Authority and Essex County Utilities Authority Mercer County Imp. Authority.

Joseph J. Slachetka, John A. Mercer, Jr., Higgins, Slachetka & Long, Laurel Springs, NJ, for amicus curiae Cape May County Mun. Utilities Authority.

Gail B. Phelps, Asst. Counsel, Bureau of Regulatory Counsel, Harrisburg, PA, for amicus curiae Pennsylvania Dept. of Environmental Resources.

Betty Jo Christian, Paul J. Ondrasik, Jr., William T. Hassler, Steptoe & Johnson, Washington, D.C. (Bruce J. Parker, Alan S. Ashkinaze, Of Counsel), and Michael F. Riccardelli, Ronald S. Bergamini, Riccardelli, Rose & Hoonhoudt, Montclair, NJ, for amici curiae City of Jersey City, Borough of Northvale, C & A Carbone, Inc., National Solid Wastes Management Ass'n, and Waste Management Ass'n of New Jersey.

Before: STAPLETON, ALITO and LEWIS, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

This appeal concerns the constitutional validity of New Jersey's solid waste regulatory scheme. Atlantic Coast Demolition and Recycling, Inc. ("Atlantic Coast") sought to enjoin enforcement of New Jersey's waste flow

regulations on the ground they violate the dormant Commerce Clause. The district court entered judgment in favor of defendant New Jersey Department of Environmental Protection and Energy ("the Department"), finding that the flow control regulations did not impose an unconstitutional burden on interstate commerce. Atlantic Coast appealed. We will reverse.

Shortly after the district court entered final judgment upholding the flow control regulations, the Supreme Court issued its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, ___ U.S. ___, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), in which the Court struck down a local flow control ordinance of the Town of Clarkstown, New York, as violative of the dormant Commerce Clause. In light of the Supreme Court's recent teachings, we conclude that the district court erred in holding that the regulations do not discriminate against interstate commerce and in applying the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Because the district court did not consider whether the regulations could pass muster under the stricter dormant Commerce Clause test applicable to discriminatory measures, we will vacate the district court's judgment and remand so that the district court may determine whether the regulations can be upheld despite their discriminatory effect.[1]

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[1] The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as the constitutionality of state regulations was challenged and we have jurisdiction over this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

I.

The facts of this case are generally not in dispute.[2] The necessary factual background concerns New Jersey's waste management system and Atlantic Coast's activities.

A. *New Jersey's Solid Waste Management System*

New Jersey has an extensive statutory and regulatory system governing the management and disposal of solid waste. This highly regulated system grew out of a crisis that began in the 1970s as a result of wide-spread illegal practices in the then private, unregulated waste disposal market and the closing of many landfills due to unsanitary conditions and noncompliance with newly enacted federal regulations. This crisis has been documented in the caselaw of both this court and the New Jersey courts. *See, e.g., J. Filiberto Sanitation v. Department of Envtl. Protection*, 857 F.2d 913, 918-19 (3d Cir.1988); *Trade Waste Management Ass'n, Inc. v. Hughey*, 780 F.2d 221, 223 (3d Cir.1985); *A.A. Mastrangelo, Inc. v. Commissioner of Department of Envtl. Protection*, 90 N.J. 666, 449 A.2d 516, 518-19,

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[2] While the Department argues that some of the district court's findings of fact were clearly erroneous, the "facts" it takes issue with actually involve the district court's application of the governing legal principles to the facts, which we discuss *infra*. The factual background summarized by the district court in its oral opinion of September 8, 1993, is supported by the record and is therefore not clearly erroneous. *See Cox v. Keystone Carbon Co.*, 894 F.2d 647, 650 (3d Cir.) (the reviewing court is not to substitute its own findings for that of the district court, but "may only make an assessment of whether there is enough evidence to support such findings"), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 23 (1990).

521 (1982); *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 348 A.2d 505 (1975), *rev'd sub nom. City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Southern Ocean Landfill, Inc. v. Mayor & Council of the Township of Ocean*, 64 N.J. 190, 314 A.2d 65, 66-67 (1974); *In re Scioscia*, 216 N.J.Super. 644, 524 A.2d 855, 857 (Ct.App.Div.1987). As the Department has observed in a recent update to its Statewide Solid Waste Management Plan:

> By the early 1980s, the department had closed, or was in the process of closing, over 300 unsafe or unregulated landfills that posed serious environmental hazards or had exhausted capacity. However, the department's persistent actions to implement rigorous environmental standards on landfill construction and operations, coupled with a steady influx of millions of tons of waste annually from neighboring states during the 1970s, resulted in a serious shortfall of disposal capacity in the state. . . .
>
> By the late 1980s, the "solid waste crisis" had become a national issue, and New Jersey, the most densely populated state in the union, was at the forefront of both the problem *and* the solution. Responding to the need to develop safe, efficient systems, by 1990 the state/county planning process produced 13 new major disposal facilities. . . . Despite this remarkable progress, however, a number of additional counties were forced by the continuing capacity shortages to make disposal arrangements with out-of-state facilities, and New Jersey, once a net importer of waste, became a net exporter with peak exports of 28% of all solid waste generated in the state in 1988. As national attention

> focused on the environmental concerns associated with solid waste management practices, a number of states moved to restrict the importation of waste. On several occasions, New Jersey waste was banned, without notice, from out-of-state facilities, resulting in serious disruptions of service and unhealthy conditions as waste collected in the streets.

New Jersey Dep't of Envtl. Protection and Energy, Div. of Solid Waste Management, *Solid Waste Management State Plan Update: 1993-2002,* Executive Summary 1-2 (Draft Jan. 1993) (App. 511-12) [hereinafter *State Plan Update-Executive Summary*].

New Jersey's existing statutory and regulatory waste management system is the result of attempts to respond to this crisis.[3] The two major statutory provisions of New Jersey's solid waste management system are the Solid Waste Management Act ("SWMA"), N.J.Stat.Ann. § 13:1E-1 to -207 (West 1991 & Supp.1994), and the Solid Waste Utility Control Act ("SWUCA"), N.J.Stat.Ann. § 48:13A-1 to -13 (West Supp.1994). These acts were passed in 1970 to establish a statutory framework to coordinate "all solid waste collection, disposal, and utilization activity" in the state, N.J.Stat.Ann. § 13:1E-2(b)(1) (West 1991), and to regulate the rates at which these services are provided as a means of providing safe, adequate, and proper waste management services, N.J.Stat.Ann. § 48:13A-2 (West Supp.1994).

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[3] An attempt to conserve landfill space by instituting a qualified ban on the importation of solid waste was struck down by the United States Supreme Court as violative of the dormant Commerce Clause in *City of Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

The Department is vested with broad regulatory authority,[4] while direct management responsibility is delegated to the twenty-two solid waste management districts that comprise the state, one for each of New Jersey's counties plus the Hackensack Meadowlands District. *See* N.J.Stat.Ann. § 13:1D-19 (West 1991). Each solid waste district is responsible for developing a ten-year solid waste management plan that must be approved by the Department before it is implemented. *Id.* §§ 13:1E-20, 13:1E-24 (West 1991). In each waste district, solid waste disposal is managed either directly by the county government or by municipal authorities created and designated by the district for this purpose.[5] Each district's waste plan must provide for "sufficient [and] suitable" disposal facilities to treat and accommodate all solid waste generated within the waste district; the districts may meet this obligation by contracting with public or private entities or by constructing and operating the waste facilities themselves. *Id.* § 13:1E-21 to -22 (West 1991); §§ 40:14B-19 (West 1991), 40:37A-55 (West 1991), 40:37C-5 (West 1991). By the early 1980s the Department had approved solid

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[4] Solid waste management functions delegated to the Board of Public Utilities were transferred to the Department in 1991. *See* Reorganization Plan No. 002-1991, set out as note under N.J.Stat.Ann. § 13:1D-1 (West 1991).

[5] These local agencies may be municipal utilities authorities, county improvement authorities, or pollution control financing authorities. *See* N.J.Stat.Ann. §§ 40:14B-1, -22.1 (West 1991 & Supp.1994); 40:37A-103 (West Supp.1994); 40:37C-3 (West 1991). Five of the waste districts manage through county control while eleven use the utilities authority model and the remaining six use either county improvement or pollution control financing authorities.

waste management plans for each of the twenty-two solid waste districts. *State Plan Update-Executive Summary, supra,* at 1 (App. 511).

In addition to this system of local district management, the disposal facilities[6] themselves are subject to state regulation by the Department. The private or public entity performing the disposal service must register with and obtain approval from the Department before providing disposal service, N.J.Stat.Ann. § 13:1E-5 (West 1991), and must obtain a certificate of public convenience and necessity from the Board of Regulatory Commissioners, *id.* § 48:13A-6 (West Supp.1994). To register with the Department, a waste disposal facility must obtain a solid waste permit which is granted only after review of the appropriateness of the facility's location, its effect on the surrounding community, and its consistency with the state and district solid waste plans. N.J.Admin.Code tit. 7, §§ 26-2.3 to -2.4; 26-2.8 to -2.9. Waste disposal permits are also conditioned on the facility's operator satisfying the "integrity" requirements contained in N.J.Stat.Ann. § 13:1E-126 to -135 (West 1991 & Supp.1994),[7] and only disposal facilities included in a district plan will receive

---

[6] Disposal facilities include transfer stations (at which solid waste is transferred from collection vehicles to haulage vehicles for transportation to an offsite disposal facility), resource recovery centers (which engage in both recycling and waste disposal), sanitary landfills, and incinerators. N.J.Stat.Ann. § 48:13A-3 (West Supp.1994).

[7] These requirements were enacted in response to the illegal anticompetitive activities that previously existed within the private waste industry.

operating permits, *id.* §§ 13:1E-4, -26 (West 1991 & Supp.1994).

Additionally, all disposal facilities are regulated on the state level as public utilities. N.J.Stat.Ann. § 13:1E-27 regulation, the disposal facilities must therefore provide their services at just and reasonable rates, *id.* § 48:13A-2 (West Supp.1994). Pursuant to traditional utility regulation, the disposal facilities must therefore provide their services at just and reasonable rates, *id.* § 48:13A-2 (West Supp.1994), in a nondiscriminatory manner, *id.* §§ 48:3-3, -4 (West Supp.1994), and may not abandon or discontinue service without authorization, *id.* § 48:2-24 (West 1969). Nor may the solid waste facilities adjust their rates without regulatory approval. *Id.* § 48:2-21 (West 1969).

Like waste disposal, solid waste *collection* was originally regulated under the utility structure as well, but pursuant to the Solid Waste Collection Regulatory Reform Act, which became effective in 1992, waste collection services will no longer be regulated as public utilities, although they will continue to be under the supervision of the Board of Regulatory Commissioners. *See* N.J.Stat.Ann. §§ 48:13A-7.1 to -7.23 (West Supp.1994). Thus, although waste collection rates will no longer be regulated, a company will still be required to register and obtain a certificate of public convenience before performing waste collection services in the state. *See id.* § 13:1E-5(a) (West 1991); *id.* § 48:13A-6 (West Supp.1994). Full rate deregulation of the waste collection industry will occur in April 1996.[8]

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[8] Under the former rate regulation system, the regulated rate for government-owned disposal facilities became, by

Additionally, the Board of Regulatory Commissioners may designate a district as a solid waste disposal franchise area to be served by one or more entities engaged in waste disposal. N.J.Stat.Ann. § 48:13A-5 (West Supp.1994). According to the Department, such franchises have been awarded to most of the districts and public authorities responsible for the waste districts' solid waste management.[9] A franchise grants a solid waste disposal facility the "exclusive right to control and provide for the disposal of solid waste, except for recyclable material whenever markets for those materials are available, within a district or districts" as long as the proposed franchise is consistent with the district's solid waste plan. *Id.* The district government or public authority, as franchisee, may operate the disposal facility itself, or contract with another district or with a private facility.

As an integral part of the district plan and utility regulation system, the Department and waste districts are authorized under the SWMA and SWUCA to direct the flow of waste to designated facilities. N.J.Stat.Ann. § 48:13A-4(c) (West Supp.1994); Op.N.J. Att'y Gen. No. 3 (1980). It is the resultant waste flow regulations that Atlantic Coast challenges in this action. The waste flow requirements enable the waste districts to control the processing and disposal of all solid waste generated

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operation of law, a component of the tariff of all solid waste collectors. N.J.Stat.Ann. § 48:13A-7.8 (West Supp.1994). This aspect of the system will continue until full deregulation in 1996.

[9] Amici Hudson County Improvement Authority, Passaic County Utilities Authority, and Essex County Utilities Authority have all been awarded such franchises.

within the district. *See* Op.N.J. Att'y Gen. No. 3 (1980). The district plans specify to which disposal facility the waste from each of New Jersey's 567 municipalities is directed, and these designations are codified as Department regulations. N.J.Admin.Code tit. 7, § 26-6.5.

These waste flow measures do not apply to separated recyclable materials. N.J.Admin.Code tit. 7, § 26-1.1(a)(1). The separation of recyclables from other waste at the source of the waste and the marketing of recyclables may be performed competitively by private entities, and these activities are subject to much less stringent overall regulation than waste management services. *See, e.g.*, N.J.Admin.Code tit. 7, §§ 26A-1.4(a)(2) (exemption of traditional recyclables from Department approval process), 26A-3.1 (regulation of nontraditional recyclables). Mixed waste, because it contains both waste and recyclables and therefore presents environmental risks not associated with separated recyclables, is subject to the waste flow regulations. Under recently promulgated regulations that memorialize the Department's previously informal "Pereira policy," mixed-waste generated within a waste district may be removed from the district for separation without initial processing at the designated disposal facility, as long as the nonrecyclable residue, or a similar kind and amount, is returned to the designated disposal facility, or if, in lieu of returning any residue waste, a payment equal to the tipping fees that would otherwise be due for the nonrecyclable portion is paid to that facility. N.J.Admin.Code tit. 7, §§ 26-6.9, 26-2B.9.

The disposal charges, or tipping fees[10] charged by the designated waste facilities are used for operating

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[10] Tipping fees are the rates that a disposal facility or transfer station charges the hauler who deposits waste at the

revenues. *See, e.g.*, N.J.Stat.Ann. § 40:14B-22.1 (West Supp.1994). Because the county governments and public authorities that manage these facilities may raise funds for capital construction by issuing revenue bonds, the tipping fees may also be pledged toward repayment of the bonds. According to the Department, approximately $1.6 billion in revenue debt has been issued by and remains outstanding to the county governments and authorities. The tipping fees are set by the Board of Regulatory Commissioners at a rate that will enable the waste district to recover the costs associated with its solid waste management plan, including costs associated with disposal and recycling. *See* N.J.Stat.Ann. § 48:13A-6.3 (West Supp.1994). Because the districts are engaged in aggressive disposal management and recycling programs, the tipping fees are quite high. Thus, it is often less expensive to dispose of solid waste generated in New Jersey at facilities located in a neighboring state, even when transportation costs to transport the waste to the out-of-state facility are factored in.

The disposal facilities are designated through the district planning process. N.J.Admin.Code tit. 7, § 26-6.6. The designated facilities may be located within the waste district, in another waste district pursuant to an inter-district plan, or out-of-state. Thus, a district plan can propose a contract with an out-of-state disposal facility. However, district plans must be approved by the Department and the Department candidly acknowledges that

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facility. *J. Filiberto Sanitation v. Department of Envtl. Protection*, 857 F.2d 913, 916 (3d Cir.1988).

the twin "goals of 60% recycling and disposal self-sufficiency for the nonrecyclable waste stream . . . form the core of New Jersey's current solid waste management system and constitute the statewide solid waste management objectives, criteria and standards with which the [district] plans must be consistent." Appellee's Br. at 11. Thus, as the district court found:

> Although it is not the subject of a clear legislative direction [sic], it is equally clear that the D.E.P.E. administers the law with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state. The 1993 solid waste management state plan update, which was admitted into evidence and herein referred to as the Update, provides: "As a key policy objective, New Jersey will continue to move toward achievement of self-sufficiency in disposal capacity. The Department's objective is to eliminate reliance on out-of-state disposal within a seven-year period."

App. 1017.

Accordingly, a waste district that is unable to identify sufficient existing waste facilities or suitable sites within the district, or within another district pursuant to an interdistrict agreement, to meet the district's waste needs must certify to the Department the absence of suitable in-district sites and the failure to reach an interdistrict agreement. *See* N.J.Stat.Ann. § 13:1E-21 (West 1991). Only after such a certification, can a waste district plan that designates an out-of-state disposal site receive Department approval. *In re Long-Term Out-of-State Waste Disposal Agreement Between County of Hunterdon & Glendon Energy Commission*, 237 N.J.Super. 516, 568 A.2d 547, 551-53

(Ct.App.Div.), *certif. denied*, 121 N.J. 647, 583 A.2d 337 (1990).[11] Thus, the designation process is intended to favor operators that have facilities already located within, or those that are willing to construct a facility within, the state.

B. *Atlantic Coast's Activities*

Atlantic Coast is a Pennsylvania corporation that was formed in 1989 to operate a transfer station and recycling center for construction and demolition ("C & D") debris. This facility is located in Philadelphia. Atlantic Coast is

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[11] As quoted in *In re Waste Disposal Agreement*, the 1985 Update to the Statewide Solid Waste Management Plan contained the following statement:

> "The Department considers the use of out-of-state disposal facilities to be inappropriate as a long-range solid waste management option. . . .
>
> The uncertainty inherent in use of out-of-state facilities conflicts with the philosophy of the Solid Waste Management Act, which is that districts should be able to plan for and predict the availability of disposal capacity to meet their needs. The Department has allowed several districts to rely upon out-of-state facilities, as a short-term option, in cases where districts have not been able to secure interdistrict agreements for access to in-state capacity. However, it is critical that districts which do rely on out-of-state disposal capacity, secure enforceable assurances from those facilities in order to ensure continued use until in-state facilities can be brought on line. It is equally critical that those districts develop an in-state solution as quickly as practicable."

In re Waste Disposal Agreement, 568 A.2d at 551.

licensed by the Commonwealth of Pennsylvania Department of Environmental Resources to accept for processing at its facility various types of construction and demolition debris, including uncontaminated rock, soil, ferrous metals, and wood; recyclables; and unmarketable construction and demolition materials. Atlantic Coast processes the C & D debris by separating the recyclable materials from the nonrecyclable. The nonrecyclable residue waste is then shipped to landfills for disposal. During periods relevant to this appeal, Atlantic Coast was transporting the nonrecyclable waste to a landfill in Ohio. The majority of the waste processed at the Atlantic Coast facility is not recyclable; by weight only approximately eight and one-half to twenty percent of the waste is recycled.[12] Thus, most of the materials received by Atlantic Coast are shipped to a landfill for disposal.

Construction and demolition debris is generated when a building is constructed, demolished, or refurbished. It is not composed of a single material, but is rather a mixture of recyclable and nonrecyclable materials. As a practical matter, C & D waste is not source separated, that is, the generator of the debris does not separate out the recyclable materials at the construction site. Prior to separation the mixture of recyclable and nonrecyclable materials is considered waste, but once the recyclable portion is separated out, only the remaining

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[12] This figure varies depending on whether wood is included as a recyclable material. Atlantic Coast was at one time stockpiling the wood at its facility for a particular purchaser, but it appears that in the absence of that arrangement the wood is disposed of as waste.

nonrecyclable portion is considered waste. Thus, if Atlantic Coast collects C & D debris from a construction site in New Jersey and transports it to its facility for separation and processing, the waste it collects is subject to New Jersey waste flow regulations. This means that it is required by those regulations to return the nonrecyclable waste (or equivalent waste) to the source district's designated disposal facility or to pay to that facility an amount equal to the tipping fee it would pay if it returned that portion of the C & D debris to the designated facility.

Because of its proximity to New Jersey's southern counties, Atlantic Coast sought to gain access to the New Jersey's C & D debris market, but its efforts to be included as a designated facility in a district waste management plan were unsuccessful. Atlantic Coast rejected the alternate means of serving the New Jersey market, i.e., returning the residual waste to the designated facilities for processing or paying a compensating fee, as too costly. Following its unsuccessful efforts to serve the New Jersey market, Atlantic Coast filed an action in the district court challenging the constitutionality of New Jersey's solid waste flow control regulations.[13]

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[13] In addition to the Commissioner of the New Jersey Department of Environmental Protection and Energy, Atlantic Coast named as defendants two county governments – the Board of Chosen Freeholders of Atlantic County and the Board of Chosen Freeholders of Camden County, and the solid waste authorities within those counties – the Atlantic County Utilities Authority and the Pollution Control Financing Authority of Camden County. Atlantic Coast subsequently reached a settlement agreement with the county and authority defendants, pursuant to which those defendants would not participate in the district court action or in any appeals, but

In its complaint, Atlantic Coast sought a declaration that the district waste plans identified in the flow control regulations violate the Commerce Clause and a permanent injunction barring the defendants from prohibiting or interfering with the transportation of construction and demolition debris from its generation or collection within New Jersey, or in Atlantic and Camden Counties in particular, to facilities outside the state. Although the scope of Atlantic Coast's attack on the New Jersey solid waste management system was somewhat unclear from the complaint, the district court concluded that Atlantic Coast's main contention centered on the waste flow regulations. At oral argument before this court, counsel for Atlantic Coast reiterated that its dormant Commerce Clause allegation and its claim for relief were limited to the waste flow regulations, and in particular the requirement that residual waste from mixed waste loads be returned to each district's designated facility unless the facility is compensated for the lost waste revenue.

C. *The District Court Proceedings*

Atlantic Coast moved for a preliminary injunction. Following a short period of intense discovery, an evidentiary hearing was held on Atlantic Coast's motion, at which a substantial amount of deposition and live testimony was admitted. The district court promptly issued an opinion declining to enter a preliminary injunction. After further discovery, the parties elected to submit the

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would be bound by the court's determination. The Department therefore became the sole remaining defendant.

case on its merits based on the preliminary injunction record without supplementation. Ultimately, the district court entered final judgment in the Department's favor based on the findings and conclusions in its oral opinion of September 8, 1993. This appeal followed.[14]

II.

The fundamental issue presented by this appeal is whether the district court erred in concluding that the New Jersey regulatory waste flow scheme does not violate the dormant Commerce Clause. To determine this fundamental issue, three subsidiary issues must be decided: (1) whether the district court erred in applying

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[14] This court granted a stay pending the Supreme Court's disposition in *C & A Carbone, Inc. v. Town of Clarkstown*. After the Supreme Court issued its opinion on May 16, 1994, invalidating the Clarkstown waste flow ordinance, Atlantic Coast filed a motion with this court for summary reversal of the district court's final order or expedited disposition of the appeal. We denied the motion for summary reversal but expedited the appeal. *Amicus curiae* briefs were submitted in support of the Department's position by Hudson County Improvement Authority, Passaic County Utilities Authority, Essex County Utilities Authority, and Mercer County Improvement Authority ("Hudson County Amici"); by Cape May County Municipal Utilities Authority; and by the Pennsylvania Department of Environmental Resources. An *amicus curiae* brief in support of Atlantic Coast's position was submitted by the City of Jersey City, the Borough of Northvale, C & A Carbone, Inc., National Solid Wastes Management Association, and Waste Management Association of New Jersey ("the Municipal and Trade Association Amici"). Additionally, we granted the Hudson County Amici leave to participate in oral argument.

the *Pike* balancing test, rather than what we have termed the "heightened scrutiny" test,[15] (2) whether the New Jersey waste flow regulations are excepted from the strictures of Commerce Clause scrutiny under the market participant doctrine, and (3) if not, whether these regulations meet the applicable Commerce Clause test in light of New Jersey's particular circumstances. We conclude that New Jersey's waste flow regulations, in effect and by design, discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required. We reject the Department's argument that New Jersey's regulation of waste disposal through a utility system requires application of the less stringent balancing test, and likewise reject its argument that New Jersey is entitled to the market participant exception. Because the district court did not consider whether the waste flow regulations can be upheld despite their discriminatory effect, we will remand to the district court so that it may make this determination in the first instance.

III.

The Commerce Clause grants to Congress the affirmative power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the [Supreme] Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers,*

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[15] See *Norfolk Southern Corp. v. Oberly,* 822 F.2d 388 (3d Cir.1987).

Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). The negative or dormant aspects of the Commerce Clause that limit state authority apply to subject areas in which "Congress has not affirmatively acted to either authorize or forbid the challenged state activity." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir.1987). Thus, any state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause unless such regulation has been preempted or expressly authorized by Congress. The district court held that Congress has legislated in the area of solid waste disposal but "expressly left to the states the primary role in the collection and disposal of solid waste." App. 1015-16 (citing the Waste Disposal Act, codified at 42 U.S.C. § 6901(A)(4)). The parties have not advanced either a preemption or authorization argument before this court, and we decline to examine the issue further.[16] We therefore turn to the issues of whether and how New Jersey's waste flow

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[16] We note, however, that Justice O'Connor, concurring in the result reached by the *C & A Carbone* Court, recently rejected the argument that the federal Waste Disposal Act authorizes discriminatory solid waste measures. *C & A Carbone, Inc. v. Town of Clarkstown*, ___ U.S. ___, ___, 114 S.Ct. 1677, 1691, 128 L.Ed.2d 399 (1994) (O'Connor, J., concurring in the judgment). The district court's determination that Congress has authorized concurrent state legislation in the area of solid waste management is not inconsistent with Justice O'Connor's conclusion that discriminatory measures are not authorized. We note further that several competing federal measures that expressly authorized local waste flow restrictions, as well as waste importation and exportation bans, were introduced during the 103d Congress, but were not enacted into law. At least one of these measures has been introduced for consideration by the current Congress as well.

regulations affect interstate commerce. The Supreme Court's recent decision in *C & A Carbone, Inc. v. Town of Clarkstown*, ___ U.S. ___, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), provides significant guidance with respect to these issues, and we begin with a review of the opinion of the Court in that case.

A.

The solid waste flow control ordinance before the court in *C & A Carbone* required that all waste within the town of Clarkstown, New York, be processed at a designated transfer station which the town had caused to be built to comply with a consent decree between the town and the New York State Department of Environmental Conservation. *C & A Carbone*, ___ U.S. at ___, 114 S.Ct. at 1680. To finance the new facility, the town entered into an arrangement with a local private contractor under which the contractor would build the facility, operate it for five years, and then turn it over to the town for one dollar. In return, the town guaranteed the contractor a tipping fee of $81.00 per ton and guaranteed that a minimum of 120,000 tons of waste would be deposited at the transfer station for processing each year. If the total waste brought to the facility was less than 120,000 tons in any year, the town would make up the difference in the lost fees. *Id.*

To ensure that the contractor would receive the agreed upon sums, the town enacted its flow control ordinance. The town was thus assured of customers for the new transfer facility and could finance the facility through the mandated tipping fees. C & A Carbone, who operated a recycling center within the town, was found to

be violating the ordinance by transporting waste from its facility to out-of-state locations for processing. C & A Carbone challenged the constitutionality of the ordinance based on the dormant Commerce Clause. The New York courts concluded that the town's ordinance did not discriminate against interstate commerce because it applied "evenhandedly to all solid waste processed within the Town." *Town of Clarkstown v. C & A Carbone*, 182 A.D.2d 213, 587 N.Y.S.2d 681, 686 (1992). The Supreme Court reversed.

The Supreme Court first concluded that the ordinance did regulate interstate commerce, rejecting the town's contention that its flow control did nothing more than delay the entry of garbage into the stream of interstate commerce until it was safe. The Court noted that Carbone received and processed solid waste from out of state, and the requirement that it route that waste through the town's transfer station increased the cost of processing for out-of-state waste generators. More importantly for present purposes, the Court pointed out that the relevant stream of interstate commerce was not the market for solid wastes, but rather the market for solid waste processing and disposal services. "[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *C & A Carbone*, ___ U.S. at ___, 114 S.Ct. at 1682.

In addition to the effect on the cost to out-of-state possessors of garbage, the Court stressed that "even as to waste originant in Clarkstown, the ordinance prevents

everyone except the favored local operator from performing the initial processing step" and thus "deprives out-of-state businesses of access to a local market." *Id.* at ___, 114 S.Ct. at 1681. The conclusion that the ordinance affected interstate commerce was, accordingly, inescapable.

Having concluded that the town's ordinance affected interstate commerce, the Court addressed whether its effect was a discriminatory one – whether it operated to favor local commercial interests or disfavor out-of-state ones. This was important because a local measure that discriminates against interstate commerce on its face or in effect can be upheld only if it falls within "a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at ___, 114 S.Ct. at 1683. Such protectionist measures are thus subjected to heightened scrutiny as compared with local measures that pursue a legitimate local interest evenhandedly and impose only an incidental burden on interstate commerce. Nondiscriminatory measures will be upheld unless the incidental "burden on interstate commerce . . . is 'clearly excessive in relation to the putative local benefits.' " *Id.* at ___, 114 S.Ct. at 1682 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)). Because the Court found the "practical effect and design" of the Clarkstown ordinance discriminatory, it held that heightened scrutiny was required and that the *Pike* balancing test was inappropriate. *See id.*, ___ U.S. ___, 114 S.Ct. at 1684.

Clarkstown's flow control ordinance regulated the local market for solid waste processing services in a

protectionist manner. It allowed only the favored operation to process waste located within the limits of the town and the Court found this "no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.* at ___, 114 S.Ct. at 1682. In support of these conclusions, the Court cited *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), which involved a dormant Commerce Clause challenge to a city ordinance requiring that all milk sold in the city be pasteurized within five miles of the city limits. The ordinance was held to be an unjustifiable protectionist measure because it favored milk processors located within a five-mile radius. The *Dean Milk* court found "immaterial [the fact] that Wisconsin milk from outside the [local] area [was] subjected to the same proscription as that moving in interstate commerce." *Dean Milk*, 340 U.S. at 354 n. 4, 71 S.Ct. at 298 n. 4, *quoted in, C & A Carbone*, ___ U.S. at ___, 114 S.Ct. at 1682.

The Clarkstown ordinance was found to be "just one more instance of local processing requirements that . . . long have [been] held invalid." *Id.* at ___, 114 S.Ct. at 1682. Citing a long line of cases in which local processing requirements had been stricken, the Court described the evil there addressed and the evil of Clarkstown's flow control ordinance as follows:

> The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers, are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it.

> The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk*, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

___ U.S. at ___, 114 S.Ct. at 1683.

Having determined that heightened scrutiny rather than interest balancing was appropriate, the Court held that Clarkstown had "any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question." *Id.* at ___, 114 S.Ct. at 1683. In the course of so holding, the Court recognized that the flow control ordinance was adopted by the town as a means of financing the construction of a needed processing facility. This did not aid the town case, however, because there was a non-discriminatory alternative available:

> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the

> open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

___ U.S. at ___, 114 S.Ct. at 1684 (citation omitted).

B.

New Jersey's flow control regulations accomplish on a district level substantially what Clarkstown's flow control ordinance accomplished on a local level. They favor the district's designated facilities at the expense of out-of-state providers of processing and disposal services that would otherwise compete for the opportunity to service solid waste generated within the district. Here, as in *C & A Carbone* and *Dean Milk*, it is immaterial that the designated facilities are favored over other in-state facilities as well as over out-of-state ones. Similarly, it is irrelevant here, as in *Dean Milk*, that an out-of-state firm willing to build an in-district facility is entitled to compete to have that facility become a designated facility. Like the governmental entities in the other cases involving local processing requirements, New Jersey is regulating a market which the Commerce Clause intended to be open to nonlocal competitors. More specifically, New Jersey is regulating the market for solid waste processing and disposal services in each of the districts by directing district consumers of those services to utilize a favored service provider who, in the absence of exceptional circumstances, operates a local facility. It necessarily follows, we conclude, that any Commerce Clause analysis of New Jersey's flow control regulations must employ the

heightened scrutiny test and that the district court erred by subjecting them only to the balancing test of *Pike*.[17]

C.

It is true, as the Department stresses, that New Jersey has not placed an absolute bar on the utilization of out-of-state facilities as designated facilities. This, however, does not transform a fundamentally discriminatory scheme into a non-discriminatory one. While out-of-state facilities can compete to become designated facilities, the Department acknowledges that it approves district plans only if they are consistent with the "core" goal of having all of New Jersey's solid waste processed and disposed of in New Jersey within the next five years. This can be accomplished, and is being accomplished, only by selecting existing and proposed in-state facilities whenever possible. In short, out-of-state facilities do not compete on anything approaching a level playing field. *Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S.Ct. 789, 801, 117

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[17] In applying the *Pike* test, the district court relied on *J. Filiberto Sanitation v. Department of Envtl. Protection*, 857 F.2d 913 (3d Cir.1988). We there found that a requirement that all waste generated in a county be processed at the county's transfer station did not have any effect on interstate commerce because the waste entered the interstate market after processing, and then noted that the rule would have met the *Pike* test as well. Our holding that the waste flow restriction did not affect interstate commerce is inconsistent with *C & A Carbone* and is therefore overruled. To the extent *Filiberto* can be read to authorize the application of the *Pike* balancing test to New Jersey's waste flow regulations it is also inconsistent with *C & A Carbone* and is overruled.

L.Ed.2d 1 (1992) ("The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.").

In reaching our conclusion that the appropriate Commerce Clause measuring rod is heightened scrutiny, we have not been unmindful of the Department's insistence that the public utility aspects of New Jersey's solid waste system distinguish the flow control regulations here from the Clarkstown ordinance. In substance, the Department urges that (1) Clarkstown's transfer station was not a regulated public utility; (2) New Jersey's designated facilities are regulated public utilities; (3) what Atlantic Coast finds objectionable in the waste flow regulations – the monopoly and resulting captive customer base of the designated facilities – is inherent in any public utility regulatory scheme; (4) Commerce Clause analysis in the context of state public utility regulation has consistently employed the balancing test of *Pike*; and (5) state public utility regulation is upheld where, as here, the burdens on commerce are not disproportionate to the local benefits.

While we agree with the Department's first three propositions, we do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

In *New England Power Co. v. New Hampshire*, 455 U.S. 331, 334-36, 102 S.Ct. 1096, 1098-99, 71 L.Ed.2d 188 (1982), the Supreme Court reviewed an order of the New Hampshire Public Utility Commission that required the New England Power Company, a consortium of Connecticut River hydroelectric power companies, to reserve for New Hampshire residents an amount of power equal to the amount generated by the consortium within that state. The Court found that the Commission's order was essentially an "exportation ban" that placed a direct and substantial burden on interstate commerce and therefore applied the heightened scrutiny test to the discriminatory order. *Id.* at 339, 102 S.Ct. at 1100-01.

Subsequently, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), in rejecting an outdated Commerce Clause utility test that focused on whether the state was regulating wholesale or retail sales of gas or electricity, the Supreme Court noted: "Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence." *Id.* at 391, 102 S.Ct. at 1916 (citing *New England Power Co.*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982)). The Court then articulated the Pike balancing test as "[o]ne recent reformulation of the [Court's dormant Commerce Clause] test" and, after noting that the regulation at issue did not implicate economic protectionism and would involve only an incidental effect on interstate commerce, applied the balancing test to conclude that the regulation did not violate the Commerce Clause. *Id.* at 393-95, 102 S.Ct. at

1917-18.[18] Although the *Arkansas Electric* Court did not expressly characterize the regulation before it as non-discriminatory, the Court's opinion can only be read as implicitly rejecting application of the heightened scrutiny test because it found no discrimination against interstate commerce.

More recently, the Supreme Court applied the heightened scrutiny test to protectionist state public utility regulation in *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). The state statute there under attack required that all coal-fired electricity plants located within the state of Oklahoma burn at least ten percent Oklahoma mined coal. The Court concluded that the statute discriminated against interstate commerce and struck it down under the dormant Commerce Clause, noting that the question of which level of scrutiny to apply to the protectionist measure was "not a close call." *Id.* at 800 n. 12, 112 S.Ct. at 455 n. 12.

Based on this Supreme Court case law, we reject the Department's contention that because the waste flow regulations are part of a larger utility regulation system, they are not subject to the heightened scrutiny test despite any discriminatory effect.

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[18] The issue in *Arkansas Electric Cooperative Corp.* was whether the Arkansas Public Service Commission had violated the Supremacy or Commerce Clauses by asserting regulatory jurisdiction over the wholesale rates that the cooperative charged to its retail members, all of whom were located within the state. Wholesale rates charged by cooperatives was one area of wholesale electricity sales that the federal legislation and rules did not govern. *See* 461 U.S. at 377, 381-82, 103 S.Ct. at 1908-09, 1910-11.

We have found only one Supreme Court case in which a Commerce Clause challenge was made based on the exclusionary effects of a monopoly created by a state public utility regulatory scheme. In that case, *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951), the Court sustained the state utility commission's refusal to allow an out-of-state natural gas supplier to sell natural gas to industrial consumers in an area where a Michigan public utility had been granted an exclusive certificate of public convenience and necessity. *Panhandle* is not helpful here, however, because it was decided before *Arkansas Electric*. As we have noted, the Court there rejected the bright line test of cases like *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 54 (1927), and *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950), that regarded state regulation of wholesale utility markets as a direct burden on interstate commerce and state regulation of retail utility markets as "essentially local" in nature and as having only an incidental effect on interstate commerce. The Court in *Panhandle Eastern* sustained the local gas company's monopoly on the authority of *Cities Service* and the wholesale/retail distinction there reflected.

Now that the Supreme Court has rejected this distinction and made it clear in *Arkansas Electric* that public utilities regulation is not a special category for Commerce Clause purposes, it well may be that the heightened scrutiny test would be applied to a situation like that presented in *Panhandle Eastern* where an out-of-state firm challenges its exclusion from the local franchise market.

A strong argument can be made that the rationale in *C & A Carbone* would require use of this test. *See* ___ U.S. at ___, 114 S.Ct. at 1682 (finding the ordinance discriminatory because "it allows only the favored operator to process waste that is within the limits of the town" and "no less discriminatory because in-state or in-town processors are also covered by the prohibition"). We do not suggest, however, that traditional public utilities regulation of retail sales would be invalidated by heightened scrutiny. Where the regulation is addressed to a utility, like a local gas utility and unlike Atlantic Coast, whose service requires a tangible distribution system, a franchise monopoly may be the only economically feasible alternative.

We note that there is a discriminatory aspect to the waste flow control regulations in the context of New Jersey's scheme that is not present in a situation like that presented in *Panhandle Eastern*. A gas or electric utility granted a franchise to serve the needs of all residents within a local area is not ordinarily required to commit to producing its electricity or securing its natural gas supply within that area as well. Normally, both in-state and out-of-state interests may, therefore, compete equally for the franchise award and the creation of a captive consumer base does not, under these circumstances, discriminate against electricity and gas generated or produced out of state.

Under New Jersey's system, collectors of waste – those who supply disposal services at the retail level – are required to secure processing and disposal services from the designated, franchised facility and out-of-state disposal firms are thus excluded not only from the market

for such services during the franchise period but also from competing for the franchise. The burden on the flow of services from out of state in the situation now before us is thus far greater than the burden on the flow of electricity and gas from out-of-state in the traditional public utility regulation situation.

We thus conclude that the public utility aspects of New Jersey's solid waste disposal scheme do not require application of the *Pike* balancing test.

IV.

As an alternative to its argument that the nature of the New Jersey waste disposal scheme distinguishes it from the ordinance in *C & A Carbone* and requires that its waste flow regulations be subject to a more lenient level of scrutiny, the Department contends that the nature of the system earns the regulations the protection of the market participant doctrine. The Supreme Court has recognized what amounts to an exception from the restraints of the dormant Commerce Clause for otherwise discriminatory action taken by a governmental entity in its role as a market participant, rather than as a market regulator. The market participant doctrine "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277, 108 S.Ct. 1803, 1809, 100 L.Ed.2d 302 (1988). When a governmental entity enters the market place in a capacity analogous to that of private market participants and makes decisions analogous to those made by private

market participants, its decisions are not subject to dormant Commerce Clause scrutiny. Thus, " '[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*' " *Oregon Waste Systems v. Department of Environmental Quality*, ___ U.S. ___, ___n. 9, 114 S.Ct. 1345, 1354 n. 9, 128 L.Ed.2d 13 (1994) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 1810, 100 L.Ed.2d 302 (1988)).

The Supreme Court has found the market participant doctrine to be applicable in only three cases: *Hughes v. Alexandria Scrap*, 426 U.S. 794, 808-09, 810, 96 S.Ct. 2488, 2497, 2498, 49 L.Ed.2d 220 (1976) (upholding a program involving payments by a state for auto scrap where the payments were restricted to in-state processors for state-titled vehicles); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) (sustaining a restriction on the sale of government-produced cement to state residents); and *White v. Massachusetts Council of Construction Workers, Inc.*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983) (upholding an executive order requiring that city residents comprise at least one-half the staff of all public works construction projects funded in whole or part by city funds or city-administered federal funds). Two important characteristics tie these three cases together. In each situation the government was participating directly in some aspect of the market as a purchaser, seller, or producer, and the alleged discriminatory effects on the interstate market flowed from these market actions.

In the solid waste arena, the Supreme Court has not yet reviewed a case involving a government-owned waste

facility and the Court has consequently left unanswered the question as to what effect government ownership of a waste facility would have on otherwise discriminatory waste measures. *See City of Philadelphia v. New Jersey*, 437 U.S. at 627 n. 6, 98 S.Ct. at 2537 n. 6 (reserving the question whether a governmental unit who operates a landfill is a market participant); *Oregon Waste Systems*, ___ U.S. at ___n. 9, 114 S.Ct. at 1354 n. 9 (finding impermissibly discriminatory a state statute directing private landfills to pass on a mandated surcharge on out-of-state generated waste and declining to address the issue whether Oregon could accomplish its "cost-spreading" through market participation). This court, however, has applied the market participant doctrine in the context of a publicly owned waste disposal facility. In *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir.1989), *cert. denied*, 493 U.S. 1077, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990), we held that the local government did not violate the dormant Commerce Clause by charging at the county-operated landfill a higher disposal fee for waste generated outside a local area than for locally-generated waste, stating:

> If Maryland may decree that only those with Maryland auto hulks will receive state bounties, it would seem that Lycoming can similarly decree that only local trash will be disposed of in its landfill on favorable terms. If South Dakota may give preference to local concrete buyers when a severe shortage makes that resource scarce, it would seem that Lycoming may similarly give preference to local garbage (and hence local garbage-producing residents) when a shortage of disposal sites makes landfills scarce. And if Boston may limit jobs to local

> residents, we see no reason why Lycoming may not limit preferential use of its landfill to local garbage (and hence local garbage-producing residents).

Swin Resource Systems, 883 F.2d at 250 (footnote omitted). We held that the county, rather than regulating the waste disposal market, was "deciding the conditions under which [a private waste processor] could use [the public] landfill." *Id.* at 249. The county was simply operating a government facility in a manner that favored its own citizens over others, and its activities did not have "downstream" effects.[19]

The Department argues that the market participant doctrine is applicable here because New Jersey participates (or directs local government entities to participate) in the waste disposal market as sellers and purchasers of waste disposal services and disposal capacity. The districts "sell" waste disposal services, according to the Department, through the designated disposal facilities. Where a district has opted not to own or operate the designated facilities directly, it "purchases" these services for "resale" by contracting with private facilities for the

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[19] In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984), a four-justice plurality held that the market participant doctrine did not apply to an Alaska regulation requiring in-state processing of timber obtained by private companies from state forest land because it had the effect of controlling aspects of the timber market in which the government, acting as a timber seller, did not participate. 467 U.S. at 97-99, 104 S.Ct. at 2245-47 (opinion of White, J.). The regulation was thus seen as having impermissible "downstream" effects.

provision of waste disposal services. Thus, the Department maintains, the waste flow regulations simply represent a means by which the state manages the districts' market participation and the regulations are therefore protected from Commerce Clause scrutiny under the market participant doctrine.

While we do not quarrel with the Department's characterization of the districts' activities as involving purchases and sales of disposal service and capacity, we cannot agree with its conclusion that the waste flow regulations, therefore, cannot be violative of the dormant Commerce Clause. When a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market. In *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), for example, an Oklahoma statute required all electrical utilities in the state, including state-owned utilities, to burn a mixture of coal containing at least ten percent Oklahoma-mined coal. The Court recognized that Oklahoma could legitimately impose this restriction on state-owned utilities because, as a market participant, it was entitled to make its own decisions regarding energy source purchases. That fact did not, however, immunize from dormant Commerce Clause review its attempt to regulate the behavior of others in the market. As we have earlier noted, the Court applied heightened scrutiny and found the statute invalid.[20] Oklahoma's participation in the market as an

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[20] The Court refused to uphold that portion of the statute that applied specifically to the state-owned utility after

electricity producer did not permit it to regulate in a discriminatory manner privately owned utilities in the same market.

Under New Jersey's solid waste disposal program, the districts are doing more than making choices about what waste they will accept even in those instances where the district owns the designated facility. The waste flow regulations purport to control the market activities of private market participants. Those regulations do not concern only the manner of operation of the government-owned or government-managed designated disposal facilities; they require everyone involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal. They do not merely determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service – even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant. As a result, those regulations are not immune from review under the Commerce Clause.

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determining that it could not be severed from the remaining provisions. *Wyoming*, 502 U.S. at 457-61, 112 S.Ct. at 802-04. In so doing, the Court stated: "We leave to the Oklahoma Legislature to decide whether it wishes to burden this state-owned utility when private utilities will otherwise be free of the Act's restrictions." *Id.* at 461, 112 S.Ct. at 804.

V.

Because we conclude that the waste flow regulations discriminate against interstate commerce on their face or in effect, and that they are not protected from dormant Commerce Clause scrutiny under the market participant exception, the only remaining question is whether the regulations can survive the heightened scrutiny test. "[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986) (internal quotations and citation omitted). While Atlantic Coast urges us to decide whether the Department has so demonstrated, we decline to do so.

When the district court decided this case, *C & A Carbone* had not been decided and *J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir.1988), was the law of this circuit. Understandably relying on *Filiberto*, the district court balanced the benefits to New Jersey against the burden on interstate commerce under *Pike*. It therefore had no occasion to consider whether the Department had accomplished the much more onerous task of demonstrating that there is no alternative to its waste flow control regulations that would accomplish its legitimate objectives.

The parties compiled a very substantial record in the district court, much of which consisted of live testimony the district court had the benefit of hearing. Based on that

record, it is not difficult to believe the Department and the amici when they insist that New Jersey has one of the most serious and complex solid waste problems in the country. At the same time, it is apparent from the record that the feasibility and effectiveness of alternative measures pose technologically and economically complex issues. While these issues have been touched upon in the briefing before us, it is fair to say that they have not been the focus of the parties' efforts on this appeal.[21] In this context, we believe that this court, the parties, and the public deserve the benefit of the district court's views before this controversy is finally resolved.

We are mindful of the fact that New Jersey has vowed not to abandon its present system until compelled to do so and of Atlantic Coast's contention that it suffers more irreparable injury with each passing month. We note, however, that Atlantic Coast is free at any time to apply again for *pendente lite* relief. The district court's prior decision to deny such relief was based primarily on its conclusion that Atlantic Coast had failed to demonstrate a likelihood of success on the merits of its challenge. This conclusion was based in turn on its view that the more lenient *Pike* test was the applicable one. After

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[21] The district court is in a far better position than we to evaluate whether the focus of the efforts of the parties before it would have been substantially the same had *C & A Carbone* been earlier decided. Accordingly, we leave it to the discretion of the district court in the first instance whether to resolve the remaining issues, including the issue of the appropriate form of relief if relief is to be granted, on the basis of the current record or to reopen the record for supplementary evidence.

C & A Carbone, the likelihood of success issue is a materially different one from that which the district court previously addressed.

VI.

Because the waste flow regulations discriminate against interstate commerce by restricting the access of out-of-state facilities to waste processing and disposal service markets, they can be upheld only if they can survive the heightened scrutiny required by *C & A Carbone*. Because the district court analyzed the waste flow regulations under the more lenient *Pike* balancing test, we will remand for application of the appropriate test. For the foregoing reasons, the district court's judgment in favor of the Department will be reversed and this case will be remanded for further proceeding consistent with this opinion.

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, Circuit Judges.

SUR PETITION FOR REHEARING

March 28, 1995

The petition for rehearing filed by appellee, Commissioner, NJ Dept. of Env. Protection having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular

active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

APPENDIX B

U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY.

ATLANTIC COAST DEMOLITION
AND RECYCLING, INC.,

VS.

BOARD OF CHOSEN
FREEHOLDERS OF
ATLANTIC COUNTY, ET AL,

DEFENDANTS.

DOCKET NUMBER 93-2669

DECISION ON MOTION

SEPTEMBER 8, 1993
UNITED STATES COURTHOUSE
CAMDEN, NEW JERSEY, 08101

BEFORE: THE HONORABLE JOSEPH E. IRENAS,
U.S. DISTRICT COURT JUDGE,
DISTRICT OF NEW JERSEY

APPEARANCES:

MESSRS. MESIROV, GELMAN, JAFFEE,
CRAMER AND JAMIESON
BY: MARK ROSEN, ESQUIRE
AND
JODI ISENBERG, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS.

GAIL LAMBERT, DEPUTY ATTORNEY
GENERAL,
AND

STEFANIE A. BRAND, DEPUTY ATTORNEY GENERAL
ATTORNEYS FOR THE STATE OF NEW JERSEY

STEPHEN J. DANER,
REGISTERED PROFESSIONAL REPORTER,
CERTIFIED SHORTHAND REPORTER,
OFFICIAL U.S. REPORTER

WITNESS INDEX

(NONE THIS DATE)

EXHIBITS MARKED IN EVIDENCE

(NONE THIS DATE)

[p. 5] (THE FOLLOWING TAKES PLACE IN OPEN COURT).

THE COURT: I THOUGHT I WOULD SAY REMAIN SEATED, BUT YOU WOULD RISE ANYHOW. RATHER THAN MAKE YOU DEFY GRAVITY.

FIRST I WOULD LIKE TO THANK COUNSEL FOR BOTH SIDES FOR DOING A VERY THOROUGH JOB AND WORKING DURING THE SUMMER TIME, VERY SHORT TIME FRAME, UNDER GREAT PRESSURE TO MAKE A, TO MAKE A GOOD RECORD.

I APOLOGIZE IN ADVANCE THAT I DOUBT THAT MY ORAL OPINION WILL BE THE SAME QUALITY AS THE LEGAL WORK THAT WAS DONE BY COUNSEL AT THESE THREE SIDES HERE, MAYBE MORE. MISS LONDON IS TWO SIDES BY HERSELF. BUT, BY THE ATTORNEYS IN THIS CASE.

GIVEN A WEEK, I SUPPOSE WE COULD CRANK SOMETHING OUT THAT ALMOST WOULD PASS BLUE

BOOK MUSTER. BUT GIVEN THE CASE WILL BE MOST LIKELY GOING TO THE THIRD CIRCUIT IN ANY CASE, REGARDLESS OF THE OUTCOME, I FELT IT WAS BETTER TO RENDER AN ORAL DECISION NOW, THAN, AND TO GET IT OVER WITH, IF YOU WILL.

I'M GOING TO PROCEED FIRST BY MAKING FINDINGS OF FACT. I AM THEN GOING TO SET FORTH THE SUMMARY JUDGMENT STANDARD AND THEN ANALYZE EACH OF THE FACTORS UNDER THE SUMMARY JUDGMENT – EXCUSE ME, THE PRELIMINARY JUDGMENT STANDARD. QUITE OBVIOUSLY THE GREATEST PORTION OF THAT WILL BE THE LIKELIHOOD OF SUCCESS ON THE MERITS. I'LL DEAL WITH THEM, [p. 6] WITH EACH OF THE OTHER ISSUES AS WELL.

I'M GOING TO START OUT WITH THE FINDINGS OF FACT.

THIS BY THE WAY – SOMEONE CAN BE GARBAGE IN AND GARBAGE OUT CASE. TALKING COMPUTERS. WE HAD GARBAGE IN AND GARBAGE OUT.

(1) THE ISSUE OF SOLID WASTE MANAGEMENT AND DISPOSAL REACHED A STATE OF CRISIS IN THE 1970S AND 1980S, AS A RESULT OF EXPANDING ENVIRONMENTAL AWARENESS, INCREASED REGULATION AT THE FEDERAL AND STATE LEVELS, AND A SHORTAGE OF ENVIRONMENTALLY ACCEPTABLE LANDFILLS AND INCINERATORS.

(2) THE SCARCITY OF LANDFILLS AND INCINERATORS COINCIDED WITH A PERSISTENT INCREASE IN THE AMOUNT OF SOLID WASTE PRODUCED IN THE PUBLIC AND PRIVATE SECTORS. THESE TRENDS MADE LANDFILL SPACE EVEN MORE VALUABLE, WHILE ENCOURAGING THE SPREAD OF "ILLEGAL DUMPING" OF SOLID WASTE AT UNAUTHORIZED SITES.

(3) THE SOLID WASTE MANAGEMENT ISSUE WAS AND REMAINS PARTICULARLY CRITICAL IN NEW JERSEY BECAUSE OF ITS DENSE POPULATION, LIMITED LAND AVAILABILITY, SENSITIVE NATURAL RESOURCE AREAS, AND THE SIGNIFICANT URBAN AND INDUSTRIAL DEVELOPMENT.

(4) AT THE TIME OF THE SUPREME COURT DECISION IN *PHILADELPHIA VS. NEW JERSEY,* 437 U.S. 617, 1977, AVAILABLE LANDFILL SPACE WAS IN SHORT SUPPLY RELATIVE TO THE AMOUNT OF WASTE. SINCE THEN, FEDERAL AND STATE LEGISLATIVE EFFORTS [p. 7] HAVE SPURRED NEW DEVELOPMENT IN RECYCLING, INCINERATION, AND ADVANCED DISPOSAL TECHNIQUES. AS A RESULT, THERE HAS BEEN SOME IMPROVEMENT IN THE AVAILABILITY OF DISPOSAL SITES, AND EVEN SOME COMPETITION AMONG SITES.

(5) AT THE TIME OF THE *PHILADELPHIA* DECISION, THE MAJORITY OF WASTE DISPOSAL FACILITIES WERE PRIVATELY OWNED AND OPERATED. SINCE THEN, STATES LIKE NEW JERSEY HAVE TAKEN AN ACTIVE, IF NOT PROPRIETARY ROLE IN WASTE DISPOSAL AND/OR RESOURCE RECOVERY. FOR EXAMPLE, THE STATE HAS EMPLOYED ITS FRANCHISING AUTHORITY TO GRANT FRANCHISES IN THIRTEEN OF THE TWENTY-TWO WASTE MANAGEMENT DISTRICTS; ELEVEN OF THESE GRANTS ARE TO COUNTIES OR THEIR AGENCIES. IN OTHER WORDS, NEW JERSEY HAS GONE BEYOND PROMULGATING REGULATIONS ON WASTE MANAGEMENT TO PARTICIPATING ACTIVELY IN THE PROCESS THROUGH COUNTY GOVERNMENTS OR INDEPENDENT GOVERNMENTAL AGENCIES. I DON'T HAVE THE PAGE CITE, BUT IT IS IN THERE UNDER THE FRANCHISE SECTION.

(6) PRIOR TO 1980, SOLID WASTE MANAGEMENT IN NEW JERSEY WAS HANDLED ON AD HOC BASIS. THE LEGISLATIVE FINDINGS THAT ACCOMPANIED THE SOLID WASTE MANAGEMENT ACT (SWMA), N.J.S.A. 13:1E-1 *ET SEQ.*, NOTED WITH DISAPPROVAL THAT, "THE MANAGEMENT OF SOLID WASTE IN NEW JERSEY CONSISTS LARGELY OF PIECEMEAL, UNCOORDINATED ACTIVITIES DEVELOPED TO MEET THE IMMEDIATE NEEDS OF LOCAL GOVERNMENT WITH LITTLE, IF ANY, REGARD FOR REGIONAL PLANNING AND COORDINATION." ENACTMENT [p. 8] OF THE SWMA WAS DESIGNED. TO RECTIFY THE PERCEIVED FLAWS OF THE AD HOC SYSTEM: LACK OF COORDINATION AMONG THE COUNTIES AND BETWEEN THE STATE AND COUNTY GOVERNMENTS; FOCUS ON SHORT-TERM, RATHER THAN LONG-TERM GOALS; LOCAL, RATHER THAN REGIONAL PLANNING; AND ABSENCE OF STATE SUPERVISORY GUIDELINES.

(7) THE CURRENT SYSTEM IN NEW JERSEY FOR MANAGEMENT OF SOLID WASTE DISPOSAL IS BASED ON THE SWMA. IT ESTABLISHES A GENERAL, STATEWIDE STATUTORY FRAMEWORK WITHIN WHICH THE COUNTIES OPERATE. IT THEN DELEGATES RESPONSIBILITY TO THE COUNTIES FOR DEVELOPING WASTE DISPOSAL PLANS THAT ENCOURAGE SOURCE SEPARATION AND RECYCLING. A KEY COMPONENT OF THE COUNTY PLANS IS CONTROL OVER THE FLOW DIRECTION OF WASTES, SO THAT WHERE POSSIBLE, WASTE IS DISPOSED OF IN THE COUNTY PURSUANT TO AN INTERCOUNTY AGREEMENT.

(8) IF A COUNTY CURRENTLY LACKS SUFFICIENT DISPOSAL AND CAPABLE – TWENTY-ONE OF

THE COUNTIES, ONE IS THE HACKENSACK MEDOWLANDS [sic] DISTRICT, SOMETIMES SAY COUNTY, SOMETIMES DISTRICT.

IF A COUNTY CURRENTLY LACKS SUFFICIENT DISPOSAL FACILITY, IT MAY ARRANGE FOR OUT-OF-COUNTY, AND EVEN OUT-OF-STATE DISPOSAL. BEFORE LEAVING THE COUNTY, A HAULER OF WASTE GENERATED WITHIN THE COUNTY MUST TRANSPORT THE WASTE TO A DESIGNATED TRANSFER STATION. PROCEDURES AT THESE TRANSFER STATIONS DIFFER, BUT, AT THE VERY LEAST, THE [p. 9] CONTENTS OF THE TRUCKS ARE ACCOUNTED FOR, WEIGHED, VISUALLY INSPECTED AND DIRECTED TO A PARTICULAR LOCATION.

MERCER COUNTY IS ONE SUCH EXAMPLE OF A COUNTY THAT HAS CONTRACTED WITH AN OUT-OF-STATE FACILITY FOR WASTE DISPOSAL: TRUCKS LEAVING THE COUNTY FIRST PASS THROUGH A TRANSFER STATION, WHERE THE CONTENTS OF THE TRUCK ARE THEN EXAMINED, REMOVE THE TARPAULIN AND LOOK AT THE TOP OF THE TRUCK, ACCOUNTED FOR; AND THEN THE TRUCK IS DIRECTED TO A DISPOSAL FACILITY IN PENNSYLVANIA WHERE AN AGENCY IN MERCER COUNTY HAS PURCHASED AIRSPACE TO MEET THE LONG-TERM PROJECTED NEEDS. I THINK THAT'S THE GROSS LANDFILL IF I'M NOT MISTAKEN TAKEN.

(9) THE COSTS OF DISPOSING SOLID WASTE IN NEW JERSEY, MEASURED IN TERMS OF "TIPPING FEES," ARE QUIT [sic] EXPENSIVE RELATIVE TO FEES AVAILABLE ELSEWHERE. LANDFILL ARE AVAILABLE IN NEIGHBORING STATES EVEN WITH ADDITIONAL TRANSPORTATION COSTS, ARE FREQUENTLY CHEAPER THAN STATE FACILITIES. STATE, I DON'T MEAN STATE RUN, BUT FACILITIES IN THE STATE OF NEW JERSEY.

(10) NEW JERSEY HAS MADE CONSIDERABLE EFFORTS TO IMPLEMENT COUNTY RECYCLING PROGRAMS AND TO EDUCATE THE PUBLIC ABOUT THE BENEFITS OF RECYCLING. THESE EFFORTS HAVE REALIZED SUCCESS: ACCORDING TO STATISTICS FOR THE CALENDAR YEAR 1991, 52 PERCENT OF THE TOTAL WASTE STREAM WAS RECYCLED, AND THE PERCENTAGE IS EXPECTED TO INCREASE. THAT [p. 10] WAS ADMITTED INTO EVIDENCE IN THIS CASE.

(11) A UNIFIED WASTE DISPOSAL SYSTEM RESTRICTING THE MOVEMENT OF SOLID WASTE WITHIN THE STATE BENEFITS THE CITIZENS OF NEW JERSEY. CURTAILING THE TRANSPORT OF SOLID WASTE ON ROADS IN THE STATE REDUCES THE WEAR AND TEAR CAUSED BY GARBAGE TRUCKS. IT LIKEWISE CUTS DOWN ON THE AMOUNT OF DEBRIS CAUSED BY TRASH FALLING FROM THE TRUCKS. SUCH MEASURES ALSO REDUCE THE ODOR THAT EMANATES FROM TRASH IN TRANSIT.

(12) A WASTE DISPOSAL SYSTEM THAT MANDATED THAT NON-RECYCLABLE SOLID WASTES BE DISPOSED OF IN THE COUNTY OF ORIGIN FACILITATES ENFORCEMENT EFFORTS. STATE AND COUNTY OFFICIALS ARE BETTER ABLE TO KEEP TRACK OF WASTES GENERATED WITHIN A GIVEN COUNTY. ESPECIALLY IN COUNTIES THAT DO NOT CONTAIN A DISPOSAL SITE, WHERE HAULERS ARE PROCESSED THROUGH A TRANSFER STATION BEFORE BEING DIRECTED TO A DISPOSAL SITE IN ANOTHER COUNTY OR STATE, A FLOW CONTROL SYSTEM GREATLY INCREASES THE ABILITY OF COUNTY OFFICIALS TO KEEP TRACT [sic] OF, AND THEREBY CONTROL SOLID WASTE, PREVENT ILLEGAL DUMPING.

(13) AFFORDING COUNTY OFFICIALS A MEANS OF OVERSIGHT OVER THE DISPOSAL OF SOLID

WASTE GENERATED WITHIN A COUNTY REDUCES THE OPPORTUNITIES FOR ILLEGAL DUMPING BY EFFECTING A MORE EFFICIENT USE OF LIMITED ENFORCEMENT RESOURCES.

(14) TO THE EXTENT THE SOLID WASTE MANAGEMENT ACT, N.J.S.A. 13:1E-1 *ET SEQ*, REQUIRES CAPITAL EXPENDITURES TO [p.11] MEET ITS MANDATE, E.G., FOR THE CONSTRUCTION OF NEW FACILITIES, THE ACQUISITION OF SITES FOR LANDFILLS, ETCETERA, THE THE [sic] ABILITY OF LOCAL GOVERNMENT UNITS TO FINANCE AND/OR PAY FOR THESE PROJECTS, WHETHER THROUGH BONDING OR TAX REVENUES, IS DEPENDENT ON THE EXISTENCE OF SOLID WASTE TO BE PROCESSED AND/OR DISPOSED OF BY THESE FACILITIES. REQUIRING ALL WASTE GENERATED WITHIN A PARTICULAR COUNTY TO BE DISPOSED OF WITHIN THAT COUNTY IS A REASONABLE METHOD OF ENSURING ADEQUATE SUPPLY OF SOLID WASTE. IT ENHANCES THE ABILITY OF LOCAL GOVERNMENT UNITS TO SECURE FUNDS TO CONSTRUCT THESE FACILITIES, AND ENHANCES THE LOCAL GOVERNMENT UNITS TO RECOUP THEIR INVESTMENTS.

(15) RELIANCE ON PRIVATE, OUT-OF-STATE DISPOSAL SOURCES FOR THE LONG-TERM DISPOSAL OF SOLD [sic] WASTES GENERATED WITHIN THE STATE MIGHT REASONABLY BE CONSIDERED UNRELIABLE AND IMPRUDENT. NEW JERSEY WOULD NOT BE ABLE TO GUARANTEE THE AVAILABLE [sic] OF SUFFICIENT SPACE TO MEET NEEDS.

THE OUT-OF-STATE FACILITY ALSO CANNOT GUARANTEE ITS OWN STATES LEGISLATURE WOULD REFRAIN FROM ACTING IN THAT AREA. AFTER ALL, THE LIFE OF A LANDFILL IS AT LEAST PARTLY A FUNCTION OF STATE REGULATIONS. THE LEGISLATURE OF A STATE MIGHT DIRECTLY CLOSE DOWN

THE LANDFILL; IT MIGHT ALSO REDUCE ITS INTAKE CAPACITIES INDIRECTLY BY STATUTE OR REGULATIONS. IN EITHER EVENT, THE OUT-OF-STATE FACILITY COULD OFFER NO ASSURANCES AS TO THE AVAILABILITY OF SPACE OR THE [p. 12] CONSISTENCY OF REQUIREMENTS FOR ACCEPTING NEW JERSEY WASTE.

MOREOVER, PRIVATE CONTRACTS ARE, WHILE SUBJECT TO ACTION FOR BREACH, WHICH IS A RISKY MEANS OF ENSURING ABIDANCE WITH CONTRACT PROVISIONS. WHERE, AS HERE, A STATE OPERATES UNDER A MANDATE TO DEVISE LONG-TERM PLANS FOR DISPOSAL OF SOLID WASTE, RELIANCE ON OUT-OF-STATE SOURCES OF DISPOSAL IS FRAUGHT WITH CONSIDERABLY MORE RISK THAN A PLAN WHICH RELIES ON IN-STATE DISPOSAL SCHEMES.

(16) THE DEPENDENCE ON OUT-OF-STATE FACILITIES NOT ONLY LEAVES NEW JERSEY VULNERABLE TO THE LEGISLATURE OF THE RECIPIENT STATE; BUT IT ALSO LEAVES NEW JERSEY VULNERABLE TO FEDERAL LEGISLATION, UNDER THE COMMERCE CLAUSE, THAT WOULD ALLOW STATES TO LIMIT OR CONDITION THE ACCEPTANCE OF SOLID WASTE FROM OTHER STATES. CONGRESS COULD MOST EASILY PASS A BILL WHICH WOULD ALLOW STATES TO LIMIT OR CONDITION ACCEPTANCE OF SOLID WASTE FROM OTHER STATES. THIS ONLY UNDERSCORES NEW JERSEY'S VULNERABILITY IF IT WERE TO RELY ON OUT-OF-STATE DISPOSAL SOURCES.

I NOTE AT LEAST IN THE HAZARDOUS WASTE AREA IT MIGHT ALREADY BE ARGUED THAT CONGRESS HAS MANDATED EACH STATE PROVIDE FOR DISPOSAL OF ITS OWN WASTES. REFERRING TO 42 U.S.C. SECTION 9604, CITING CAPITAL (A) SUB (A),

WHICH MANDATES EACH STATE HAVE ADEQUATE CAPACITY FOR THE DESTRUCTION, TREATMENT OR SECURE DISPOSITION OF ALL HAZARDOUS WASTES THAT ARE REASONABLY EXPECTED TO BE [p. 13] GENERATED WITHIN THE STATE DURING THE 20-YEAR PERIOD FOLLOWING THE DATE OF SUCH CONTRACT OR COOPERATIVE AGREEMENT AND TO BE DISPOSED OF, TREATED, OR DESTROYED. IT WOULD BE A SIMPLE MATTER FOR THE LEGISLATURE TO SAY EACH STATE HAS TO TAKE CARE OF ITS OWN WASTE AND LEAVE THOSE THAT HAVE NOT DONE SO IN A MUCH WEAKER POSITION.

(17) PLAINTIFF, ATLANTIC COAST DEMOLITION AND RECYCLING, INC., ATLANTIC COAST, IS A PENNSYLVANIA CORPORATION WITH ITS PRINCIPAL PLACE OF BUSINESS LOCATED AT 1107 SOUTH 34TH STREET, PHILADELPHIA, PENNSYLVANIA. IT IS A WHOLLY OWNED SUBSIDIARY OF UNITED WASTE SYSTEMS, INC.

(18) ATLANTIC COAST WAS ORGANIZED IN 1989 TO OPERATE A TRANSFER STATION AND RECYCLING CENTER FOR CONSTRUCTION AND DEMOLITION OF C AND D DEBRIS. IT ENTERED INTO A LONG-TERM LEASE FOR THE SITE OF THE 34TH STREET FACILITY IN 1990.

I BELIEVE THAT THE PLAINTIFF IN FACT PURCHASED THE SITE FROM MR. DELLA OR FROM A COMPANY OR ENTITY OR PARTNERSHIP WITH WHICH MR. DELLA WAS ASSOCIATED.

(19) INITIALLY, ATLANTIC COAST WAS ISSUED A PERMIT BY THE CITY OF PHILADELPHIA FOR THE RECYCLING OF CERTAIN METALS, PAPER, WOOD, STONE AND CONCRETE. IN 1988, HOWEVER, THE COMMONWEALTH OF PENNSYLVANIA ENACTED A STATE-WIDE WASTE MANAGEMENT SCHEME, THE MUNICIPAL WASTE PLANNING RECYCLING AND

WASTE REDUCTION ACT, 53 PENNSYLVANIA STATUTES, SECTIONS 4000.101 *ET SEQ.* ATLANTIC COAST SHUT DOWN OPERATIONS FROM [p. 14] 1990 THROUGH 1993 TO EFFECT COMPLIANCE WITH THE NEW STATUTE.

(20) PERMIT NUMBER 101581 WAS GRANTED BY THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES (PADER) IN OCTOBER OF 1992, AND ATLANTIC COAST REOPENED ITS 34TH STREET FACILITY IN FEBRUARY OF 1993. THE PERMIT ALLOWED ATLANTIC COAST TO ACCEPT FOR PROCESSING AT THE FACILITY VARIOUS TYPES OF CONSTRUCTION AND DEMOLITION WASTE INCLUDING UNCONTAMINATED ROCK, UNCONTAMINATED FERROUS METALS, WOOD, RECYCLABLES UNCONTAMINATED SOIL, AND NONMARKETABLE CONSTRUCTION AND DEMOLITION MATERIALS. THE LAST OF THESE IS UNSUITABLE FOR PROCESSING; INSTEAD, IT IS STOCKPILED, SHIPPED TO LANDFILLS AND BURIED.

(21) CONSTRUCTION AND DEMOLITION DEBRIS, CLASSIFIED IN NEW JERSEY AS CLASS 13 SOLID WASTE, IS UNIQUE IN SEVERAL RESPECTS. THIS TYPE OF WASTE IS GENERATED WHEN A BUILDING IS CONSTRUCTED, DEMOLISHED, OR REFURBISHED. IT IS NOT COMPOSED OF A SINGLE MATERIAL, BUT RATHER OF A MIXTURE OF RECYCLABLE AND NON-RECYCLABLE MATERIALS. IF THE GENERATOR OF THE DEBRIS SEPARATES OUT THE RECYCLABLE PORTIONS AT THE SITE, "SOURCE SEPARATION", THE SEPARATED PORTION IS NOT CONSIDERED WASTE, ALTHOUGH THE NONRECYCLABLE COMPONENTS ARE. AS A PRACTICAL MATTER, MOST CONSTRUCTION AND DEMOLITION WASTE IS NOT SOURCE SEPARATED. IN EFFECT, THIS MEANS THAT CONSTRUCTION AND DEMOLITION

DEBRIS, EVEN THAT WHICH IS PARTIALLY RECYCLABLE, IS OFTEN DEEMED NON-RECYCLABLE WASTE AND MUST BE DISPOSED OF [p. 15] IN LANDFILLS. IN NEW JERSEY, SUCH WASTE WOULD BE SUBJECT TO FLOW DIRECTION CONTROL, AND WOULD HAVE TO BE DISPOSED OF IN ITS COUNTY OF ORIGIN OR IN A COUNTY SPECIFIED BY INTERCOUNTY AGREEMENT, WHICH WE WILL HEAR MORE LATER.

(22) THE OPERATIONAL SCHEME AT ATLANTIC COAST IS AS FOLLOWS: TRUCKS CARRYING DEBRIS ENTER INTO THE FACILITY, AND THEIR CONTENTS ARE EXAMINED BY OVERHEAD CAMERA AND VISUAL INSPECTION TO VERIFY THAT ONLY ACCEPTABLE DEBRIS IS ON BOARD. FROM THERE, THE TRUCKS PROCEED TO A WEIGH STATION AND THEN TO A CONCRETE PAD, ONTO WHICH THE CONTENTS ARE DUMPED. RECYCLABLE MATERIALS ARE REMOVED AND REMAINDER IS STOCKPILED FOR FUTURE SHIPMENT BY RAIL TO A LANDFILL IN OHIO.

(23) IF WOOD IS EXCLUDED FROM THE CALCULATIONS, ATLANTIC COAST RECYCLES 8 AND ONE-HALF PERCENT BY WEIGHT IT RECEIVES; IF WOOD IS INCLUDED, THE FIGURE MAY BE AS HIGH AS 20 PERCENT. IN EITHER CASE, MOST OF THE MATERIALS RECEIVED AT THE ATLANTIC COAST FACILITY ARE SHIPPED TO OHIO FOR DISPOSAL AT A LANDFILL.

(24) THE HIGH PERCENTAGES OF MATERIALS SHIPPED TO A LANDFILL, RATHER THAN RECYCLED, IS ENTIRELY CONSISTENT WITH THE CORPORATE DIRECTIVES OF ATLANTIC COAST AND UNITED WASTE. THE PRESIDENT OF UNITED WASTE NOTED DURING THE HEARING FOR A PRELIMINARY INJUNCTION THAT IS IS [sic] CHEAPER, AND THUS PREFERABLE, TO SHIP ITEMS TO A LANDFILL

RATHER THAN RECYCLE [p. 16] THEM. I'M READING FROM PAGE 152, LINE 19 OF THE TRANSCRIPT THROUGH PAGE 154, LINE 7.

> THE COURT: FOR A GIVEN TON YOU DO MAKE MORE MONEY GOING TO OHIO OR RECYCLING.
>
> THE WITNESS: FOR A GIVEN TON WITH THE EXCEPTION I WOULD SAY OF THE WOOD CHIPPING WHICH WE THINK WILL ADD PROFITS TO BUSINESS, THE RECYCLING PROBABLY BREAK EVEN TO A SLIGHT LOSS.
>
> THE COURT: SO THAT THE SHIPPING TO OHIO FOR A TON –
>
> THE WITNESS: SHIPPING TO OHIO FOR A TON WE HAVE IN THE AFFIDAVIT AND WE THINK IT COST US NOW APPROXIMATELY 30, 40 PERCENT OF THE 42 DOLLARS.

I NOTE 42 DOLLARS IS WHAT THEY CHARGE THE CUSTOMER. THEIR TIPPING FEE.

> THE COURT: RIGHT NOW IT'S MORE PROFITABLE TO SEND IT TO OHIO?
>
> THE WITNESS: YES.
>
> THE COURT: PRIOR TO THE FACT THAT YOU ARE LOOSING OR MAKING MONEY FOR A GIVEN TON OF GOODIES, IT IS CHEAPER YOU, YOU DO BETTER SENDING IT TO OHIO RATHER THAN RECYCLING?
>
> THE WITNESS: OTHER THAN THE WOOD, BECAUSE THE WOOD IS SO BULKY IN THE RAILROAD CAR, IT'S CRUSHED AND PRESSED TO GET THE WEIGHT OUT. SO I

WOULD SAY [p. 17] OTHER THAN THE WOOD MY VIEW WOULD BE, YES, THAT'S CORRECT.

THEN BY MR. ROSEN QUESTIONING –

QUESTION: MR. SHEEHAN, YOU SAID IN RESPONSE TO MY LAST QUESTION AND THEN WENT INTO A COMMENT. I'M NOT SURE YOU MEANT YES OR YES TO ACKNOWLEDGE MY QUESTION.

IF THE COMPANY HAD TO SEND ALL THE NONRECYCLABLE WASTE BACK AND ONLY TOOK THE RECYCLABLES WOULD IT, WOULD ATLANTIC COAST BE PROFITABLE A. I DIDN'T FINISH MY RESPONSE.

THE WAY THE TRANSFER STATION MAKES ITS PROFITS AND THIS IS TRUE TO A LARGE EXTENT IN SOME OF OUR COLLECTION OPERATIONS, IS THAT YOU MAKE THE MONEY ON THE TRANSPORTATION AND DISPOSAL AND YOU DO THE RECYCLING BECAUSE IT'S ENVIRONMENTALLY THE RIGHT THING TO DO OR YOU ARE REQUIRED TO DO UNDER THE REGULATIONS. YOU, YOU SERVE AS A LANDFILL BASE. BUT THE MONEY IS PAID ON THE TRANSPORTATION AND DISPOSAL.

Q. IF THE COMPANY DID RECYCLING AND NOT TRANSPORTATION AND –

A. GO OUT OF BUSINESS PROBABLY IN A SHORT PERIOD OF TIME.

(25) BECAUSE OF ITS PROXIMITY TO THE SOUTHERN COUNTIES [p. 18] OF NEW JERSEY, ATLANTIC COAST SOUGHT TO GAIN ACCESS TO THE

NEW JERSEY CONSTRUCTION AND DEMOLITION WASTE MARKET. REPRESENTATIVES FROM ATLANTIC COAST AND ITS PARENT, UNITED WASTE, CONTACTED REPRESENTATIVES OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, "DEPE", AND VARIOUS COUNTY GOVERNMENTS TO OBTAIN INFORMATION REGARDING ELIGIBILITY REQUIREMENTS. DESPITE VARIOUS EFFORTS, ATLANTIC COAST WAS UNSUCCESSFUL IN BEING INCLUDED IN ANY COUNTY'S WASTE MANAGEMENT PLAN.

(26) IN STARK CONTRAST TO THE TWO-YEAR SHUTDOWN TO COMPLY WITH PENNSYLVANIA REQUIREMENTS, ATLANTIC COAST FILED SUIT A MERE TWO MONTHS AFTER FAILING TO BE INCLUDED IN ANY COUNTY PLAN. IT DID THIS DESPITE CONFLICTING INTERPRETATIONS OF NEW JERSEY REQUIREMENTS, SOME OF WHICH INDICATED THAT THE COMPANY COULD RECEIVE NEW JERSEY SOLID WASTE EVEN THOUGH NOT NAMED IN A COUNTY PLAN. IN ADDITION, ATLANTIC COAST DID NOT INVESTIGATE, EXCEPT IN THE MOST CURSORY FASHION, THE POSSIBILITY OF BECOMING A REPOSITORY FOR SOLID WASTE FROM NEW JERSEY, THIS DESPITE THE FACT ITS COMPETITORS IN PENNSYLVANIA ARE ACCEPTING NEW JERSEY WASTE. ATLANTIC COAST 'FAILED TO EXPLORE THE OPPORTUNITIES AVAILABLE TO IT FOR PARTICIPATING IN THE DISPOSAL OF NEARLY 20 PERCENT OF THE SOLID WASTE GENERATED IN NEW JERSEY, WHICH IS CURRENTLY EXPORTED TO FACILITIES IN OTHER STATES.

(27) THE FINANCIAL PICTURE OF ATLANTIC COAST INDICATES [p. 19] THAT AFTER A FEW MONTHS IN OPERATION, SALES FIGURES HAD BEGUN TO LEVEL OFF IN JUNE, JULY AND AUGUST OF 1993. HOWEVER, AT THIS POINT PLAINTIFF'S ALLEGATIONS ARE SIMPLY INSUFFICIENT – I SHOULD SAY PLAINTIFF'S EVIDENCE ARE SIMPLY INSUFFICIENT TO ESTABLISH THE EXTENT TO WHICH ACCESS TO NEW JERSEY MARKETS WOULD IMPROVE ATLANTIC COAST'S FINANCIAL PICTURE. IT IS TOO EARLY TO ASSESS THE IMPACT OF START-UP COSTS AND INTERCORPORATE PAYMENTS. MOREOVER, PLAINTIFF HAS NOT DEMONSTRATED THE PERCENTAGE OF CURRENT CLIENTS WHO ARE FROM NEW JERSEY, TO SAY NOTHING OF CLASSIFYING THEM ACCORDING TO SOURCE SEPARATION OR NON-SOURCE SEPARATION. IN SHORT, THE ALLEGATIONS REGARDING THE IMPORTANCE OF NEW JERSEY CLIENTS TO THE CONTINUED EXISTENCE OF ATLANTIC COAST HAVE NOT BEEN CORROBORATED. ALTHOUGH IN TESTIMONY THERE WAS A LOSS AND A SHARPLY INCREASED LOSS IN JULY AND AUGUST, THERE REALLY IS NO ANALYSIS OF WHAT CAUSED THAT LOSS, WHAT THE BREAK EVEN POINT WOULD BE. NO FINANCIAL ANALYSIS OF PROFITABILITY BY LINE, WHETHER BE WOOD CHIPPING, BY RECYCLING, CHIPPING AND DISPOSAL. I CONSIDER THIS FAIRLY SIGNIFICANT ONLY BECAUSE THE FINANCIAL RECORDS ARE SOLELY IN THE POSSESSION OF ATLANTIC AND UNITED. NOT SOMETHING THE STATE HAS ACCESS TO.

(28) NOTWITHSTANDING THE FACT THAT ATLANTIC COAST HAS EXCLUSIVE CONTROL OVER ITS FINANCIAL RECORDS, NONE HAS BEEN OFFERED TO THE COURT IN THIS PROCEEDING. THAT IS, [p. 20] NOTHING HAS BEEN PROFFERED TO THE COURT TO DEMONSTRATE WITH ANY SORT OF PRECISION THE IMPACT OF ACCESS TO THE NEW JERSEY MARKETS. SUCH RECORDS ARE PARTICULARLY NECESSARY IN CASES LIKE THIS INVOLVING A WHOLLY OWNED SUB SUBSIDIARY, WHERE ACCOUNTING PROCEDURES FOR SUBSIDIARIES ARE OFTEN EXTREMELY COMPLEX. FOR EXAMPLE, TESTIMONY AT THE HEARING REVEALED THE EXISTENCE OF A 4 PERCENT "MANAGEMENT FEE" THAT WAS OWED EACH MONTH TO THE PARENT COMPANY, WHICH NECESSARILY AFFECTED THE FINANCIAL STATEMENTS OF ATLANTIC COAST. THERE IS ALSO NO INDICATION HOW THE LOSSES INCURRED DURING THE 1990-92 SHUTDOWN OF THE FACILITY HAVE BEEN AMORTIZED. EVEN IF THE COURT ACCEPTS AS A GIVEN, WHICH IT DOES, THE PROPOSITION THAT ACCESS TO NEW JERSEY WASTE WOULD IMPROVE THE COMPANY'S FINANCIAL POSITION, IT CANNOT DISCERN THE QUANTUM OF IMPROVEMENT WITHOUT ANY DETAILED – WITHOUT DETAILED FINANCIAL DATA.

THE LEGAL CONCLUSIONS THAT FOLLOW MAY ALSO CONTAIN ADDITIONAL FACTUAL FINDINGS. THEREFORE, THE FACTUAL FINDINGS OF THIS SECTION SHALL BE DEEMED SUPPLEMENTAL BY ANY FACTUAL FINDINGS INCLUDED, BURIED OR IMBEDDED IN MY CONCLUSIONS OF LAW.

THE THIRD CIRCUIT MAINTAINS A STRINGENT FOUR-PART STANDARD FOR THE AWARD OF A PRELIMINARY INJUNCTION, RECOGNIZING THAT THE GRANT OF INJUNCTIVE RELIEF IS AN "EXTRAORDINARY REMEDY WHICH SHOULD BE GRANTED ONLY IN [p. 21] LIMITED CIRCUMSTANCES." *INSTANT AIR FREIGHT CO. VS. C.F. AIR FREIGHT INC.*, 882 F.2D 797, 800, (3D CIR. 1989). THE DISTRICT COURT MUST BALANCE ONE (1) THE LIKELIHOOD THAT THE MOVANT WILL PREVAIL ON THE MERITS AT A FINAL HEARING; (2) THE EXTENT TO WHICH THE PLAINTIFF IS BEING IRREPARABLY HARMED BY THE CONDUCT COMPLAINED OF; (3) THE EXTENT TO WHICH THE DEFENDANTS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS ISSUED; AND (4) THE PUBLIC INTEREST. *S & R CORPORATION VS. JIFFY LUBE INTERNATIONAL, INC.* 968 F.2D 371, 374 (3D CIR. 1992) *KERSHNER VS. MAZURKIEWICZ*, 670 F.2D 440, 443 (3D CIR. 1982); *IN RE ARTHUR TREACHER'S FRANCHISEE LITIGATION*, 689 F.2D 1137, 1143 (3D CIR. 1982). THE DISTRICT COURT MAY BALANCE THE POSSIBILITY OF HARM TO THIRD PERSONS, OR TO THE PUBLIC INTEREST. *KERSHNER*, 670 F.2D AT 443; *ELI LILLY AND CO. VS. PREMO PHARMACEUTICAL LABORATORIES, INC.*, 630 F.2D 120 (1980).

AS FOR THE REQUIREMENT OF IRREPARABLE HARM, THE MOVANT IS REQUIRED TO MAKE A "CLEAR HOWING [sic] OF IMMEDIATE IRREPARABLE INJURY." *HOHE VS. CASEY*, 686 F.2D 69, 72 (3D CIR. 1989); *ECRI VS. MCGRAW HILL, INC.*, 809 F.2D 223, 226 (3D CIR. 1987).

IN ADDITION, THE MOVANT MUST DEMONSTRATE TO THE COURT "A REASONABLE PROBABILITY EVENTUAL SUCCESS IN THE LITIGATION." *OBURN VS. SHAPP*, 521 F.2D 142, 148 (3D CIR. 1975). THE COURTS HAVE, HOWEVER, EASED THE REQUIREMENT [p. 22] SLIGHTLY "WHERE FACTORS OF IRREPARABLE HARM, INTERESTS OF THIRD PARTIES AND PUBLIC CONSIDERATIONS STRONGLY FAVOR. THE MOVING PARTY." *CONSTRUCTORS ASSOCIATION OF WESTERN PENNSYLVANIA VS. KREPS*, 573 F.2D 811, 815 (3D CIR. 1978).

NOW, THE BULK OF MY LEGAL CONCLUSIONS ARE GOING TO DEAL WITH THE LIKELIHOOD OF SUCCESS ON THE MERITS, WHICH I THINK OCCUPY 98 PERCENT, IF NOT 100 PERCENT OF OUR ORAL ARGUMENT. BUT I DO THINK THE OTHER THREE STANDARDS ARE SOMEWHAT IMPORTANT.

LET ME FIRST TALK ABOUT THE FOURTH OF THEM, THE PUBLIC INTEREST, IN WEIGHING THE PUBLIC INTEREST. AT THIS POINT NEW JERSEY, AND I WILL BE GOING INTO IT AT GREAT LENGTH OR GREATER LENGTH WHEN I DO THE LIKELIHOOD OF SUCCESS ON THE MERITS, HAS DEVELOPED A COMPLEX INTEGRATED STATEMENT TO DEAL WITH THE SOLID WASTE CRISES. IT IS DONE SO, AS I INDICATED DURING COLLOQUY, WITH A GREAT DEAL OF SUCCESS. THERE IS NO QUESTION IN MY MIND THAT A HOLDING THAT CONSTITUTIONALLY WHAT MAY BE CALLED THE HEART, TO SOME DEGREE, OF THE NEW JERSEY SYSTEM, THE FLOW DIRECTIVES, ONE CAN ARGUE THAT THE HEART OF THE ENTIRE

SYSTEM IS THE COUNTY DIRECTIONS, THE PROVISIONS WHICH DIRECT WASTE FROM THE COUNTY BE DISPOSED OF IN THE COUNTY WOULD BE EXTRAORDINARILY DISRUPTIVE TO THE CURRENT SYSTEM. AND THAT IN THE SHORT RUN, AT LEAST, THE PUBLIC WOULD SUFFER. I KNOW AN ARGUMENT CAN BE MADE THAT THE BENEFITS OF FREE ENTERPRISE AS IN THE TELEPHONE COMPANY OR [p. 23] OTHER ANTITRUST CASES TO THE BENEFIT OF THE PUBLIC, THERE IS NO QUESTION THAT WHEN YOU DISRUPT A SYSTEM AS BROAD AND COMPLEX AS THIS ONE, BY, TO SOME DEGREE I DON'T MEAN IT IN A PEJORATIVE WAY, BUT SKIMMING OFF A CERTAIN CLASS OF WASTE, YOU WILL CERTAINLY IN THE SHORT-TERM HURT THE PUBLIC INTEREST. I SO FIND. TO THE EXTENT THAT THAT IS A FACTOR, I THINK THE PUBLIC INTEREST HERE AT LEAST IN THE SHORT-TERM, THAT ANALYSIS, THAT WEIGHING OF THAT, WEIGHS IN FAVOR OF DENIAL OF PRELIMINARY INJUNCTION.

IT HAS NO REAL FACTOR, WEIGHS NO WEIGHT AT THE ULTIMATE CONSTITUTIONALITY, OF COURSE, OF THE REGULATION IN QUESTION. BUT AT THE PRELIMINARY DISCUSSION STAGE TO THE EXTENT IT IS A FACTOR, I THINK IT WEIGHS AGAINST THE GRANTING OF A PRELIMINARY INJUNCTION. IF IT WOULD WEIGH IN FAVOR OF IT, THE INJUNCTION WOULD BE GRANTED. YOU MAY WELL GIVE SOME TIME FOR IMPLEMENTING, AS I ONCE DID IN A CASE, GIVE THE STATE A TIME TO CHANGE.

THE NUMBER TWO AND THREE ELEMENTS OF THE PRELIMINARY INJUNCTION ANALYSIS ARE, THE EXTENT TO WHICH PLAINTIFF IS BEING HARM [sic] BY THE CONDUCT COMPLAINED OF, AND THE EXTENT TO WHICH THE DEFENDANT WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS ISSUED.

AS I INDICATED IN MY FINDINGS OF FACT, I'M ACCEPTING THE PROSPECT THAT A PHILADELPHIA TRANSFER STATION OR MATERIAL RESOURCE OR RECOVERY FACILITY IS ALLOWED TO TAKE [p. 24] NEW JERSEY WASTE, A CHANCE WOULD BE MORE PROFITABLE IF NOT, IF A PHILADELPHIA TRANSFER STATION OR MRF IS ALLOWED TO TAKE WASTE, CHANCES ARE IT WOULD BE MORE PROFITABLE THAN IF NOT ALLOWED TO TAKE WASTE OR MORE PROFIT THAN NOT ALLOWED TO TAKE WASTE. AND I ALSO REALIZE THAT YOU DON'T HAVE THE NORMAL ANALYSIS HERE OF ADEQUACY OF REMEDY AT LAW BECAUSE ANY LOSSES THEY SUSTAINED, IF AT THAT TIME THE STATUTE IS UNCONSTITUTIONAL, ARE NOT RECOVERABLE IN AN ACTION BECAUSE THE STATE, I BELIEVE, WOULD BE BASICALLY IMMUNE FROM DAMAGE, NOT INJUNCTIVE ACTION OR NOT CONSTITUTIONAL ACTION, BUT WITHOUT GOING INTO IT, THE CHANCES OF ANYBODY RECOVERING DAMAGES ON THE GROUNDS A PARTICULAR REGULATION VIOLATED THE COMMERCE CLAUSE ARE PRETTY REMOTE. PROBABLY BE PROVEN WRONG ON THAT, BUT I'M GOING ON THAT ASSUMPTION.

THE REAL PROBLEM HERE ON THE QUESTION OF BOTH IRREPARABLE HARM AND THE EXTENT TO WHICH THE DEFENDANTS WILL SUFFER IRREPARABLE HARM, IS THE VERY CONCLUSIORY [sic] FINANCIAL INFORMATION PUT IN. WE WERE TOLD THERE WAS A LOSS, BUT IMPOSSIBLE FOR JUST FOUR OR FIVE MONTH PERIOD, BUT IMPOSSIBLE TO REALLY DETERMINE WHAT EXTENT THAT LOSS IS BECAUSE YOU COULDN'T GET WASTE FROM NEW JERSEY – A LOT OF WASTE IN NEW JERSEY IN PENNSYLVANIA. THERE WAS TESTIMONY, AND I'LL FIND THERE WAS A FAIRLY SUBSTANTIAL VALUE OF WASTE COMING IN FROM NEW JERSEY. IT WASN'T NO NEW JERSEY WASTE. I HEARD TESTIMONY THAT I THOUGHT THAT SOUNDED LIKE 25 OR 30 [p. 25] PERCENT. AGAIN, NO REAL DOCUMENTATION PUT IN THAT WOULD TELL ME EXACTLY WHAT WAS GOING TO NEW JERSEY AND THE KIND OF THINGS GOING FROM NEW JERSEY. BUT THERE WASN'T – THERE WAS NO NEW JERSEY WASTE GOING IN. THERE WAS QUITE A BIT OF NEW JERSEY WASTE COMING IN. SOME INDICATION MAYBE IN AUGUST IT BEGAN TO FALL OFF BECAUSE OF THREATENED ENFORCEMENT ACTIONS BY THE STATE. BUT ABSOLUTELY NO QUANTIFICATION OF WHAT THE FALL OFF WAS, WHAT THE CAUSE WAS, WHETHER FALL OFF IN THE NEW JERSEY BUSINESS. THERE SEEMS TO BE A REFERENCE TO PUT IN REAL HARD CORE FINANCIAL DATA. YOU WOULD ALMOST EXPECT IN A CASE LIKE THIS AN EXPERT ACCOUNTING WITNESS TO COME IN AND SAY, HERE IS THE OPERATION. HERE ARE THE FINANCIALS. HERE IS HOW

WE MAKE MONEY. HERE IS HOW WE LOSE MONEY. THIS IS WHAT WE WOULD PREDICT IF NEW JERSEY WAS OPEN. THESE ARE THE CONTRACTS WE WOULD HAVE. INSTEAD IT WAS KIND OF AMORPHOUS, IN GENERAL. NOT ONE STANDING EXTRAORDINARY EFFORT IN, BUT TO THE CASE TOGETHER BY THE PLAINTIFF.

ON BALANCE, CERTAINLY I FIND THAT THERE IS A PRETTY STRONG PROBABILITY THAT BEING AT LEAST TO SOME EXTENT BARED [sic] FROM THE NEW JERSEY MARKET PLACE HAS CAUSED A SOME LOSS OF PROFITS TO THE PLAINTIFF BUT HOW MUCH, TO WHAT EXTENT, WHAT EXTENT THE SITUATION WOULD IMPROVE, JUST IMPOSSIBLE FOR ME TO DETERMINE.

I THINK ON BALANCE, AT THIS STAGE IN THE LITIGATION, REALLY DIFFICULT FOR ME TO SAY THAT THE PLAINTIFF HAS BEEN [p. 26] IRREPARABLY HARMED. THAT THE PLAINTIFF IS LOSING MONEY, I ACCEPT. I HAVE NO FINANCIALS TO DISPUTE IT. THEY SAY THEY ARE LOSING MONEY. I ACCEPT THEY ARE LOSING MONEY. BUT THAT LOSS IS TIED DIRECTLY TO NEW JERSEY'S STATUTORY AND REGULATORY SCHEME IS VERY HARD FOR ME TO FIND.

I HAVE BEEN SWAMPED WITH A GREAT DEAL OF INFORMATION, BUT I HAVE BEEN ASKED TO ACCEPT ON FAITH THAT IF WE CAN ONLY GET INTO NEW JERSEY WE WOULD MAKE TONS OF BUCKS, BUT WE HAVEN'T BEEN ABLE TO GET INTO NEW JERSEY AND THEREFORE WE ARE LOSING MONEY.

NOW, EVEN THOUGH THAT ALONE MIGHT BE GROUNDS FOR ME TURNING DOWN THE PRELIMINARY INJUNCTION, I HAVE THIS INHERENT GUT-LIKE, JUDGE-LIKE FEELING THAT WHERE CONSTITUTIONAL RIGHTS ARE INVOLVED AND CONSTITUTIONAL, ALLEGED CONSTITUTIONAL VIOLATIONS, ONE MIGHT ARGUE THAT THAT ALMOST IS PER SE IRREPARABLE HARM.

QUITE CANDIDLY, IN TRYING TO GET MY HANDS AROUND THIS CASE, I HAVE NOT DONE EXTENSIVE RESEARCH ON, YOU KNOW, BEYOND THE ROUTINE ON THE STANDARD FOR PRELIMINARY INJUNCTION, I DON'T KNOW LURKING OUT THERE, THERE IS A LINE OF CASES THAT SAY THAT CERTAINLY WERE PERSONAL RIGHTS – IF THURGOOD MARSHAL ANALYSIS WOULD APPLY, DEALING WITH THAT KIND OF ISSUE, THERE'S NO DOUBT IN MY MIND THERE IS IRREPARABLE HARM PRESUMED. FIRST AMENDMENT ISSUE. YOU WOULDN'T WORRY WHETHER THE PERSON WAS LOSING MONEY OR NOT. [p. 27] BUT HERE WE ARE DEALING WITH AN ECONOMIC ISSUE. DOLLARS AND CENTS. DOING BUSINESS.

IF I APPLY THE TRADITIONAL NOTIONS OF IRREPARABLE HARM ELEMENTS, I DON'T THINK THE PLAINTIFF HAS DONE IT.

ON THE OTHER HAND, IF I INCORPORATE INTO IT A VIOLATION OF ONE'S CONSTITUTIONAL RIGHTS, IN THIS SENSE, CAN NEVER REALLY BE RETROACTIVE REMEDIES, NEVER REALLY MAKE THE PERSON WHOLE WHEN IT'S ALL OVER. WHETHER

BECAUSE OF THE 11TH AMENDMENT LIMITATIONS, SUITS AGAINST STATES OR ON OTHER KINDS OF THINGS, IT WOULD BE TRUE IN A THURGOOD MARSHAL TYPE CASE. FOR THAT REASON, ALL THOUGH [sic] YOU KNOW MY HOLDING ON THE CONSTITUTIONAL GROUND, THEY HAVE NOT MET THE IRREPARABLE HARM, BECAUSE OF THE POSSIBILITY THE THIRD CIRCUIT WILL SAY THERE WERE CONSTITUTIONAL RIGHTS CONCERNING A LIKELIHOOD OF SUCCESS ON THAT ISSUE, THE IRREPARABLE HARM WOULD BE PRESUMED, AS I KNOW THERE ARE CASES HOLDING THAT IN OTHER AREAS OF CONSTITUTIONAL PRECEDENTS, I'M GOING TO GO INTO THE ISSUE OF THE MERITS OF THE CASE ITSELF.

THE DECISION OF THE [sic] WHAT FOLLOWS IS BASICALLY MY CONCLUSIONS OF LAW, ALTHOUGH I, FOR LACK OF TIME, THEY WILL BE BURIED IN HERE, AS NOTED EARLIER, SOME FURTHER FACTUAL FINDINGS. TO THE EXTENT I MAKE FACTUAL RATHER THAN LEGAL FINDINGS, I DO NOT MEAN TO MAKE THEM SOLELY BECAUSE THEY ARE IN WHAT I'M CALLING MY FINDINGS OF LAW DISTINCT FROM MY FINDINGS OF FACT.

[p. 28] (1) THE DECISION OF THE SUPREME COURT IN CITY OF PHILADELPHIA VS. NEW JERSEY, 1977, WHICH WAS 437 U.S. 617, THE COURT APPLIED THE "DORMANT" ASPECT OF THE COMMERCE CLAUSE, ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION TO INVALIDATE A NEW JERSEY LAW WHICH FORBID THE IMPORTATION OF GARBAGE INTO THE STATE, FOR THE STATED PURPOSE OF PRESERVING THE STATES'S DWINDLING

LANDFILL SPACE. BY THE WAY, THE REFERENCE TO THE DORMANT ASPECT, IF YOU READ THE COMMERCE CLAUSE, IT TALKS ABOUT THE FEDERAL GOVERNMENT'S AFFIRMATIVE RIGHT TO REGULATE INTERSTATE COMMERCE. IT DOESN'T SPEAK IN TERMS OF WHAT THE STATE CAN'T DO, BUT HAS BEEN INTERPRETED FOR 150 YEARS, PROBABLY, TO NOT ONLY AFFIRMATIVELY GIVE THE FEDERAL GOVERNMENT THE RIGHT TO LEGISLATE IN THE INTERSTATE COMMERCE AREA, BUT DORMANT ASPECTS TO BAR THE STATE FROM ACTING IN THOSE AREAS WHERE THE FEDERAL GOVERNMENT HAS NOT ACTED.

THIS HOLDING WAS RECENTLY REAFFIRMED, AND AS I WILL TALK ABOUT LATER, ARGUABLY, EXPANDED. *FORT GRATIOT SANITARY LANDFILL VS. MICHIGAN DEPARTMENT OF NATURAL RESOURCES,* 112 SUPREME COURT, 2019, 1992, A CASE IN WHICH PRIVATE LANDFILL OWNERS WERE FORBIDDEN TO ACCEPT ANY WASTE NOT GENERATED IN THE COUNTY WHERE THE LANDFILL WAS LOCATED. THIS WAS HELD TO VIOLATE THE COMMERCE CLAUSE EVEN THOUGH IT IMPACTED ON GARBAGE GENERATED WITHIN THE STATE AS WELL AS WITHOUT.

ALTHOUGH THE COURT TALKED ABOUT GARBAGE AS AN ARTICLE [p. 29] OF COMMERCE – I'M NOW BACK TO THE PHILADELPHIA/NEW JERSEY CASE, THE COURT TALKED ABOUT GARBAGE AS AN ARTICLE OF COMMERCE, THE REAL ARTICLE OF COMMERCE WAS LANDFILL SPACE, AND THE NEW JERSEY LAW PROPERLY COULD BE LOOKED AT AS A

LAW FORBIDDING THE EXPORT OF LANDFILL SPACE TO NEIGHBORING STATES.

ALTHOUGH NOT MADE CLEAR IN THE OPINION, IT WAS WRITTEN IN AN ENVIRONMENT WHERE MANY, IF NOT MOST LANDFILLS WERE PRIVATELY RUN OPERATIONS WHICH MADE A PROFIT BY SELLING "SPACE" TO WHOEVER SHOWED UP AND PAID FOR IT. THE SUPREME COURT HELD THAT SIMPLY BARRING OUT-OF-STATE GARBAGE WAS NOT THE TYPE OF LEGITIMATE REGULATION WHICH COULD WITH STAND [sic] A COMMERCE CLAUSE ASSAULT NOTWITHSTANDING SOME IMPACT ON INTERSTATE COMMERCE. *PIKE VS. BRUCE CHURCH, INC.*, 397 U.S. 137. IF NEW JERSEY HAD A PRIVATELY OWNED FACTORY WHICH MADE AN ANTIBIOTIC WHICH WAS IN SHORT SUPPLY IN THE NORTHEAST, THE STATE COULD NOT SOLVE THE PROBLEMS OF ITS CITIZENS BY BANNING ITS EXPORT TO NEW YORK. IN LIKE FASHION, NEW JERSEY WAS NOT ALLOWED TO BAN THE EXPORT OF ITS SCARCE LANDFILL SPACE.

NEW JERSEY, SAID THE SUPREME COURT, COULD CERTAINLY REGULATE LANDFILLS TO PRESERVE SPACE, WETLANDS, ETCETERA, BUT NOT IN A WAY WHICH PLACE [sic] THIS BURDEN SOLELY ON CITIZENS OF OTHER STATES.

IN QUOTING FROM ANOTHER CASE, AT PAGE 627, THE SUPREME [p. 30] COURT REFERRED TO RESTRICTIONS ON "PRIVATELY OWNED ARTICLES OF TRADE." IT IS SOMEWHAT SILLY TO REFER TO PRIVATE OWNERSHIP OF GARBAGE OR WASTE

WHICH IS NOT ONLY ABANDONED BY ITS GENERATOR, BUT FOR WHOSE DISPOSAL THE GENERATOR GENERALLY PAYS. INDEED, I DOUBT THE STATE WOULD HAVE TO PAY COMPENSATION IF IT WERE TO EXERCISE EMINENT DOMAIN OVER ALL OF ITS GARBAGE. AS THE SUPREME COURT SENSED, ON PAGE 628, BUT COULD NOT QUITE GRASP, THE REAL ARTICLE OF COMMERCE WAS LANDFILL SPACE, NOT GARBAGE. INDEED, IN SOME VERY REAL SENSE, GARBAGE OR WASTE, LIKE IT OR NOT, REALLY BECOMES THE PROPERTY OF THE STATE WHEN IT IS ABANDONED BY THE OWNER THE STATE DEALS WITH ITS NEW FOUND [sic] PROPERTY EITHER BY TAKING POSSESSION OF IT AND DEALING WITH IT, AS IS DONE WITH MOST HOUSEHOLD GARBAGE, OR BY ORDERING THE GENERATOR TO PAY FOR AND ARRANGE FOR ITS DISPOSAL. IN RECENT YEARS GOVERNMENTAL ENTITIES REPLACED PRIVATE ENTERPRISE AS THE PROVIDER OF FACILITIES, SUCH AS INCINERATORS, FOR THE ULTIMATE DISPOSAL OR RECYCLING OF WASTE STREAMS.

LET ME DELINEATE. I'M NOT SUGGESTING OWNERSHIP IN ANY WAY LESSONS [sic] THE HOLDING THAT THE ARTICLE OF COMMERCE AS CORRECTLY POINTED OUT IN COLLOQUY, WHATEVER MAY ONCE HAVE BEEN THE LAW, TO THAT EXTENT STATE OWNERSHIP OF AN ITEM MAY CEASE TO MAKE IT AN ARTICLE OF COMMERCE. THAT HAS LONG SINCE BEEN REPLACED. I SAY IT ONLY TO PUT IN CONTEXT OF WHAT IS REALLY GOING ON. NOT TO SUGGEST THAT I AM MAKING A [p. 31] HOLDING

BASED ON THE THEORY THAT THE GOVERNMENT OWNS ALL THE WASTE AND, THEREFORE, SOMEHOW WOULD BE IMMUNE FROM THE COMMERCE CLAUSE OR OTHERWISE GARBAGE IS NOT REALLY AN ARTICLE OF COMMERCE.

ON PAGE 629 THE COURT STATES THAT "THERE HAS BEEN NO CLAIM HERE THAT THE VERY MOVEMENT OF WASTE INTO OR THROUGH NEW JERSEY ENDANGERS HEALTH, OR THAT WASTE MUST BE DISPOSED OF AS SOON AS AND AS CLOSE TO ITS POINT OF ORIGIN AS POSSIBLE. THE HARMS CAUSED BY WASTE OR ARE SAID TO HAVE [sic] ARISE AFTER ITS DISPOSAL IN LANDFILL SITES." THIS IS, I GUESS THE SUPREME COURT'S REPEATED HABIT OF SUGGESTING THEY KNOW EVERYTHING ABOUT EVERYTHING. WHEN ACTUALLY GO WELL BEYOND THE RECORD THEY HAD BEFORE THEM. ANYONE WHO HAS DRIVEN BEHIND A LARGE TRUCK TRANSPORTING WASTE WILL KNOW THAT THIS IS A HIGHLY DUBIOUS PROPOSITION. THIS IS A FINDING OF FACT IN 1977 AND NOT A CONCLUSION OF LAW, DO NOT CONDITION IT BINDING AS A MATTER OF LAW.

(2) THROUGHOUT THE 1970S AND 1980S, THE DISPOSITION OF SOLID WASTE HAS BEEN AN [sic] A STATE OF CRISES [sic]. *BOROUGH OF GLASSBORO VS. GLOUCESTER BOARD*, 100 N.J. 134 (1985); *J. FILIBERTO SANITATION VS. DEPARTMENT OF ENVIRONMENTAL PROTECTION* 857 F.2D 913 (3D. CIR. 1988).

(3) ALTHOUGH THE FEDERAL GOVERNMENT HAS LEGISLATED IN THE FIELD OF SOLID WASTE

DISPOSAL IN THE PROVISIONS OF THE RESOURCE CONSERVATION ACT OF 1976, NOW CODIFIED AS THE SOLID [p. 32] WASTE DISPOSAL ACT FOUND AT 42 U.S.C. SECTION 6901, ET. SEQ, IT IS CLEAR THAT CONGRESS EXPRESSLY LEFT TO THE STATES THE PRIMARY ROLE IN THE COLLECTION AND DISPOSAL OF SOLID WASTE. LOOK AT 42 U.S.C. SECTION 6901(A)(4).

(4) THE NEW JERSEY SOLID WASTE MANAGEMENT ACT, N.J.S. ANNOTATED SECTIONS 13:1E-1 TO 1E-198, WEST 1979 AND SUPP. 1988), THE ACT, SETS FORTH A COMPREHENSIVE WASTE MANAGEMENT PROGRAM FOUNDED ON THE DETERMINATION THAT "COLLECTION, DISPOSAL AND UTILIZATION OF SOLID WASTE IS A MATTER OF GRAVE CONCERN TO ALL CITIZENS AND IS AN ACTIVITY THOROUGHLY AFFECTED WITH THE PUBLIC INTEREST." SECTION 13:LE-2(A).

I DO NOT THINK AS A MATTER OF LAW THERE IS ANY DOUBT THAT THE COLLECTION DISPOSAL OF SOLID WASTE IS A MATTER TRADITIONALLY AFFECTED WITH THE PUBLIC INTEREST SUBJECT TO THE EXERCISE OF THE STATE POLICE POWER AND A MATTER OF PARTICULAR STATE CONCERN.

(5) THE ACT GIVES THE D.E.P.E. RESPONSIBILITY FOR PROMULGATING AND UPDATING A STATEWIDE SOLID WASTE MANAGEMENT PLAN. SECTION 13:1E-6(A)(3). EACH COUNTY IN NEW JERSEY IS DESIGNATED AS A SOLID WASTE DISTRICT AND HACKENSACK MEDOWLANDS [sic] WITH RESPONSIBILITY OF DEVELOPING A DISTRICT SOLID WASTE MANAGEMENT PLAN BASED ON STATE

GUIDELINES. SECTION 13:1E-19 TO 21 AND 23. NO PLAN MAY BE ADOPTED WITHOUT A PUBLIC HEARING AND OPPORTUNITY FOR WRITTEN COMMENT. SECTION 13:1E-23. UPON ADOPTION, A DISTRICT PLAN [p. 33] MUST BE REVIEWED AND APPROVED BY D.E.P.E.

(6) ALTHOUGH IT IS NOT THE SUBJECT OF A CLEAR LEGISLATIVE DIRECTION, IT IS EQUALLY CLEAR THAT THE D.E.P.E. ADMINISTERS THE LAW WITH THE SPECIFIC GOAL THAT ALL WASTE GENERATED IN NEW JERSEY BE DISPOSED OF WITHIN THE BORDERS OF THE STATE. THE 1993 SOLID WASTE MANAGEMENT STATE PLAN UPDATE, WHICH WAS ADMITTED INTO EVIDENCE AND HEREIN REFERRED TO AS THE UPDATE, PROVIDES: "AS A KEY POLICY OBJECTIVE, NEW JERSEY WILL CONTINUE TO MOVE TOWARD ACHIEVEMENT OF SELF-SUFFICIENCY IN DISPOSAL CAPACITY. THE DEPARTMENT'S OBJECTIVE IS TO ELIMINATE RELIANCE ON OUT-OF-STATE DISPOSAL WITHIN A SEVEN-YEAR PERIOD."

(7) THE FOREGOING POLICY IS IMPLEMENTED THROUGH THE INDIVIDUAL PLANS PREPARED BY EACH OF THE STATES 22 DISTRICTS, 21 COUNTIES AND THE HACKENSACK MEADOWLANDS. THE CORE OF THESE PLANS ARE THE "INTERDISTRICT AND INTRADISTRICT DISTRICT SOLID WASTE FLOW" REGULATIONS WHICH ARE FOUND IN N.J.A.C. 7:26-6.1 ET SEQ. SECTION 6.5 OF THESE REGULATIONS SETS FORTH ON A DISTRICT BY DISTRICT BASIS WHERE VARIOUS KINDS OF WASTE STREAMS, INCLUDING TYPE 13, WHICH IS INVOLVED IN THIS CASE, MUST BE DISPOSED. IN SIMPLEST TERMS,

THOSE DISTRICTS WHICH HAVE ADEQUATE INCINERATOR OR LANDFILL SPACE OR HAVE ACCESS TO SUCH FACILITIES IN OTHER DISTRICTS WITH WHOM THEY HAVE AGREEMENTS, MUST DISPOSE OF THE WASTE IN THE COUNTY WHERE IT IS GENERATED OR WITH WHOM THE GENERATING [p. 34] COUNTY HAS AN AGREEMENT. WHERE THERE IS INSUFFICIENT DISPOSAL FACILITIES, THE WASTE MUST FIRST BE TAKEN TO A TRANSFER STATION WITHIN THE COUNTY WHERE THE WASTE IS GENERATED FROM WHICH IT IS "TRANSPORTED TO PERMITTED 'OUT-OF-STATE' FACILITIES IN ACCORDANCE WITH THE LAWS AND REGULATIONS OF THE RECEIVING STATE."

THAT IS A MANTRA REPEATED OVER AND OVER AGAIN FOR TRANSFER STATIONS ARE INVOLVED IN SECTION 6.5. TRANSFER STATIONS ARE SOMETIMES PUBLIC ENTITIES AND SOMETIMES PRIVATE ENTITIES. IT IS GENERALLY THE TRANSFER STATION WHICH CONTRACTS WITH THE OUT-OF-STATE FACILITIES FOR DISPOSAL. AS A MATTER OF ADMINISTRATION, PROBABLY [sic] IS SOME DISPUTE AS TO WHETHER THE CONTRACT FOR DISPOSAL BY THE TRANSFER STATION MUST BE OR MUST NOT BE INCLUDED IN THE COUNTY PLAN AND APPROVED BY THE COUNTY. BUT IN ANY CASE, IT IS THE TRANSFER STATION WHICH IS IN A SENSE RESPONSIBLE FOR OUT-OF-STATE DISPOSAL.

THE CORE OF THIS LAWSUIT IS THE ALLEGATION THAT THE FLOW DIRECTIVES EMBODIED IN N.J.A.C. 7:26-6.5 ARE UNCONSTITUTIONAL RESTRAINTS ON INTERSTATE COMMERCE. THE

PLAINTIFF ARGUES THAT IF IT IS UNLAWFUL FOR A STATE TO BAN THE IMPORTATION OF GARBAGE AND, REFER TO EXPORTATION OF DISPOSAL FACILITIES, IT IS LIKEWISE UNLAWFUL TO BAN THE EXPORTATION OF GARBAGE, WHICH MIGHT BE VIEWED AS IMPORTATION OF DISPOSABLE, ITSELF.

[p. 35] IT MIGHT BE NOTED HERE THAT THE VARIOUS ENTITIES INVOLVED IN THE SOLID WASTE DISPOSAL SCHEME ARE GENERALLY DEEMED PUBLIC UTILITIES AND SUBJECT TO REGULATION BY THE D.E.P.E.. SEE N.J.S.A. 48:13A-1 THROUGH 13 AND N.J.S.A. 13:1D-1. BY BEING DEEMED PUBLIC UTILITIES THE RATES ARE SUBJECT TO REVIEW. THERE ARE CERTIFICATES OF CONNIVANCE AND NECESSITY AND GENERAL PARAPHERNALIA SURROUNDING THE REGULATION OF A PUBLIC UTILITY.

INTERDISTRICT AND INTRADISTRICT WASTE FLOW DIRECTIVES ARE ALSO SUBJECT TO BOARD APPROVAL PURUSANT [sic] TO N.J.S.A. 48:13A-4(C). WHAT IS NOW THE D.E.P.E. ORIGINALLY HAD BEEN THE B.U.P. [sic] AND THEN THE BOARD OF REGULATORY COMMISSIONERS. BUT ASSUME NOW THE PROVISIONS OF 48:13A-4(C) ARE REGULATED ONCE AGAIN BY D.E.P.E. YOU MIGHT ALSO LOOK AT A.A. *MASTRANGELO* CASE I CITED FOR DISCUSSION GENERALLY OF THAT SUBJECT. D.E.P.E. OBVIOUSLY HAS A SIGNIFICANT ROLE IN THE REGULATION AND ISSUANCE OF CERTIFICATES OF PUBLIC CONNIVANCE [sic] AND NECESSITY.

(8) CONSTRUCTION AND DEMOLITION MATERIALS, C AND D, WHICH ARE THE SUBJECT OF THIS

SUIT FALL WITHIN THE DEFINITION OF TYPE 13 WASTE. N.J.A.C. 7:26-2.13(G)(L)(III). IT IS OBVIOUS THE TYPE 13 WASTE CONTAINS SOME RECYCLABLE MATERIAL AS DEFINED IN N.J.A.C. 7:26A-1.3. IF THESE RECYCLABLE MATERIALS ARE "SOURCE SEPARATED" AS DEFINED IN N.J.A.C. 7:26-1.4, THEY ARE NOT DEFINED AS WASTE WHICH IS [p. 36] SUBJECT TO THE FLOW DIRECTIVES. N.J.A.C. 7:26-6.3(A)(6). HOWEVER, IF POTENTIAL RECYCLABLES ARE MIXED WITH NON-RECYCLABLES THE TOTAL MIXED LOAD IS TYPE 13 WASTE SUBJECT TO THE FLOW DIRECTIVES.

IN THIS CASE WE HAVE HEARD TESTIMONY ABOUT MIXED LOADS AND THAT IS EXACTLY WHAT WE ARE TALKING ABOUT, WASTE WHICH HAS SOME RECYCLABLE MATERIAL IN IT, BUT WHICH IS STILL TYPE 13 WASTE UNTIL SOMEBODY GETS AROUND TO SEPARATE [sic] INTO RECYCLABLE AND NON-RECYCLABLES.

(9) IN ADDITION TO LANDFILLS AND INCINERATORS, THERE ARE TWO OTHER TYPES OF WASTE HANDLING FACILITIES WHICH SHOULD BE NOTED HERE: TRANSFER STATIONS AND MATERIAL RECOVERY FACILITIES, BOTH WHICH ARE DEFINED IN N.J.A.C. 7:26-1.4. MRF'S ARE FACILITIES WHICH MANUALLY OR MECHANICALLY SEPARATE USEFUL MATERIALS FROM A WASTE STREAM AND RETURN THEM TO THE ECONOMIC MAINSTREAM. IN SHORT, THEY RECYCLE. A TRANSFER STATION MEANS "A FACILITY AT WHICH SOLID WASTE IS TRANSFERRED FROM ONE SOLID WASTE VEHICLE TO ANOTHER SOLID WASTE VEHICLE FOR TRANSPORTATION TO A

SOLID WASTE FACILITY." SINCE FEW MRF'S CAN RECYCLE 100 PERCENT OF WHAT THEY TAKE IN, IT IS FAIR TO SAY ALL MRF'S ARE ALSO TRANSFER STATIONS. IT SHOULD BE NOTED THAT N.J.A.C. 7:26-6.5 REFERS TO AT LEAST ONE FACILITY AS A TRANSFER STATION IN MERCER COUNTY, WHICH IS NOT TECHNICALLY BECAUSE UNDER THE REGULATIONS BECAUSE THE WASTE IS NOT UNLOADED AND RELOADED. [p. 37] WERE IT IN NEW JERSEY, IT APPEARS THAT ATLANTIC WOULD BE A MRF. ALSO NOTE TRANSFER STATION IS ALSO DEFINED IN N.J.S.A. 48:13A-3 AND MRG [sic] IS DESIGNED [sic] DEFINED AT 48:13A-7.3 AND SAYS THAT A, "MATERIALS RECOVERY FACILITY MEANS A TRANSFER STATION . . . " SO ALTHOUGH THERE ARE SEPARATE DEFINITIONS WHEN I SAY TRANSFER STATION IS, A MRF'S IS A TRANSFER STATION AND ATLANTIC'S FACILITY WOULD BE DEEMED A TRANSFER STATION AS WELL AS A MRF.

(10) TRANSFER STATIONS MAY PLAY A MAJOR ROLE IN DEALING WITH THAT PORTION OF THE NEW JERSEY WASTE STREAM WHICH IS DISPOSED OF AT OUT-OF-STATE LOCATIONS. AS NOTED AT PAGE 47 OF THE UPDATE, "MOST OF THE WASTE EXPORTED OUT-OF-STATE IS FIRST DELIVERED AND TRANSFERRED INTO LARGE TRAILERS AT ONE OF THE 17 REGIONAL TRANSFER STATIONS LOCATED IN THE STATE. IN ADDITION TO THESE 17 REGIONAL FACILITIES, APPROXIMATELY 33 OTHER TRANSFER STATIONS SERVE THE IN-STATE DISPOSAL SYSTEM DEVELOPED BY THE COUNTIES." PAGE 47 OF THE UPDATE SHOWS THAT I THINK IN 1991 MAYBE OUT

OF DATE, BUT 22 PERCENT OF NEW JERSEY'S WASTE IS STILL DISPOSED OF IN OUT-OF-STATE LANDFILL FACILITIES IN PENNSYLVANIA, WEST VIRGINIA, NEW YORK, OHIO AND KENTUCKY. TO THE EXTENT THAT A TRANSFER STATION IS DESIGNATED AS A PERMITTED DISPOSAL SITE IN THE FLOW DIRECTION REGULATIONS, OF N.J.A.C. 7:26-6.5, SUCH TRANSFER STATION IS GENERALLY, IF NOT EXCLUSIVELY LOCATED IN THE COUNTY WHERE THE WASTE IS GENERATED OR IN THE [p. 38] COUNTY WITH WHOM THE GENERATING COUNTY HAS AN APPROVED INTERDISTRICT AGREEMENT.

(11) ONE OF THE MINOR MYSTERIES OF THIS LITIGATION IS THE SO-CALLED PEREIRA MEMORANDUM OF JUNE 7, 1983, FOUND AT EXHIBIT D OF THE BRAND AFFIDAVIT. THIS MEMO WOULD ALLOW TRANSFER STATIONS, WHICH AS I NOTED EARLIER, INCLUDE MRF'S TO ACCEPT WASTE GENERATED IN ANOTHER COUNTY PROVIDED THAT THE NON-RECYCLABLE PORTION OF THE WASTE STREAM OR ITS EQUIVALENT, IS RETURNED TO THE SITE DESIGNATED FOR DISPOSAL BY N.J.A.C. 7:27-6.5. AN EXPANDED VERSION OF THIS POLICY WAS ISSUED AS A PROPOSED REGULATION AT 24 N.J. REGISTER 3286, 1992, AND THAT REGULATION IS EXPECTED TO BE FINAL BY SEPTEMBER 21ST, 1993, WITHIN ONE YEAR AFTER IT WAS PROPOSED.

SEE N.J.A.C. 1:30-4.2(B). IT IS THE LEGAL POSITION OF THE STATE THAT ANY HAULER CAN TAKE

A MIXED C AND D LOAD TO ATLANTIC FOR PROCESSING, AS LONG AS THE NON-RECYCLABLE PORTION OF THE WASTE STREAM, WHICH IS MOST OF IT, IS RETURNED TO THE COUNTY OF ORIGIN.

THERE APPEARS FROM THE TESTIMONY TO BE SOME CONFUSION, TO PUT IT MILDLY, AS TO THE OPERATION OF THE PEREIRA POLICY. FIRST OF ALL, THE COUNTIES THEMSELVES VERY CLEARLY FROM WHAT I HEARD IN TESTIMONY AND FROM THE WHISPERING I HEARD IN THE AUDIENCE CLEARLY INTERPRET THE PLAN DIFFERENTLY. ONE MAJOR DIFFERENCE IS WHETHER IT HAS TO BE INCLUDED AS PART OF THE COUNTY PLAN, FOR INSTANCE, TO IMPLEMENT OR WHETHER A HAULER [p. 39] CAN MERELY JUST GRAB A LOAD OF WASTE AND HOT FOOT IT TO PHILADELPHIA WITH IT, SO LONG AS HE BRINGS IT BACK. THAT IS JUST ONE CONFUSION. ANOTHER CONFUSION IS WHETHER A FRANCHISE AREA WOULD PERMIT THE PEREIRA POLICY TO OPERATE. IN OTHER WORDS, 13 FRANCHISES GRANTED IN THE STATE. ANOTHER QUESTION WHICH LAST ARISEN [sic] IS CAN A HAULER IN THAT AREA GRAB A LOAD OF GARBAGE AND HOT FOOT IT TO PHILADELPHIA WITHOUT GETTING SOMEBODY IN THE COUNTY MIGHTY UPSET, EVEN IF WILLING TO BRING BACK THE NON-RECYCLABLE WASTE STREAM. THERE APPEARS TO BE A FURTHER AMBIGUITY. NUMBER ONE, WHETHER THE PEREIRA POLICY IS NOW LAW OR WHETHER IT WILL BECOME LAW. I SUPPOSE WE HEARD REPRESENTATIONS THAT THE LAST ACT TO MAKE IT A REGULATION

WILL TAKE PLACE IN THE NEXT TWO WEEKS. BUT IT HADN'T TAKEN PLACE YET.

FOR WHATEVER IT IS WORTH, IF YOU WANT TO LOOK AT A LITTLE HISTORY OF THAT YOU CAN READ THE CASE OF *REGIONAL RECYCLING VS. STATE*, N.J. 568, 571, 1992, WHICH WILL EXPLAIN WHY THE STATE HAS PROPOSED THE REGULATION IT HAS PROPOSED.

NOTWITHSTANDING THERE HAS BEEN A LOT OF SMOKE AND SPARKS AND FIRE OVER THE PEREIRA MEMORANDUM IT APPEARS THAT THE POLICY, EVEN WHATEVER ITS CONTOURS, IS OF LITTLE PRACTICAL VALUE TO PLAINTIFF IN THIS CASE WHICH CANDIDLY CONCEDES THAT IT DOES NOT MAKE MUCH MONEY, IF ANY, ON RECYCLING, BUT RATHER ON THE ULTIMATE DISPOSAL OF THE [p. 40] NON-RECYCLABLES BY RAIL TO OHIO. THUS, ITS COMPETITIVE THRUST IN NEW JERSEY IS THAT ITS TIPPING FEES ARE FAR LESS THAN THOSE AT NEW JERSEY DISPOSAL SITES. REQUIRING THE BULK OF THE WASTE – REMEMBER TALKING ANYWHERE FROM 80 TO 91, 92 PERCENT OF IT, TO BE SHIPPED BACK TO NEW JERSEY WOULD NOT ONLY CREATE PRACTICAL OPERATIONAL PROBLEMS FOR ATLANTIC, BUT ALSO ELIMINATE THE REAL COMPETITIVE COST ADVANTAGE WHICH ATLANTIC WISHES TO HAVE IN COMPETING FOR NEW JERSEY WASTE.

SO ALTHOUGH I HAVE BEEN ENLIGHTENED BEMUSED AND AMUSED BY THE PEREIRA MEMORANDUM, THE ONLY THING NOT INTRODUCED IN EVIDENCE IS PROVE [sic] THERE REALLY A [sic] A

MR. PEREIRA. I WAS CONVINCED BY THE DIRECTOR OF RESEARCH THERE'S NO SUCH PERSON. A STAMP. WHO SIGNED THE LETTER? I MADE AN EFFORT FOR YEARS TO FIND THAT PERSON. I WAS CONVINCED HE DIDN'T EXIST. SO I HAVE NO PROOF MR. PEREIRA EXISTS, EVEN IF HE SIGNED THE PEREIRA MEMORANDUM, IT DIDN'T HAVE MUCH OF AN IMPACT ON THIS LITIGATION, BUT ENJOYED LISTENING TO IT.

(12) IT SHOULD BE MADE CLEAR AT THIS POINT THAT NOTHING IN NEW JERSEY'S LAWS OR REGULATIONS MAKES IT ILLEGAL FOR PLAINTIFF TO COMPETE FOR ITS SHARE OF THE WASTE STREAM THAT IS STILL DISPOSED OF OUTSIDE THE STATE. INDEED, THE EVIDENCE SHOWS THAT PLAINTIFF IS DIRECTLY COMPETITIVE WITH COMPANIES LIKE GROW LANDFILL, WHICH ACCEPTS CONSIDERABLE WASTE FROM NEW JERSEY. PLAINTIFF OBJECTS TO REGULATIONS WHICH FORBID INDIVIDUAL HAULERS OR GENERATORS FROM DECIDING [p. 41] TO DIRECTLY SHIP THEIR WAYS OUT-OF-STATE IN CONTRAVENTION OF THE FLOW DIRECTIVES CONTAINED IN SECTION 6.5. ALTERNATIVELY THEY SAY IF YOU CAN PUT ME IN THE PLAN AS APPROVED WITH THE DESIGNATION, THAT WOULD ACHIEVE THE SAME THING. BUT THE REAL HEART OF THE COMPLAINT IS THAT THEY ARE FORBIDDEN AND THEY ARE FORBIDDEN FROM HAVING A HAULER DECIDE I'LL PICK UP THE C AND D WASTE AT THE COURTHOUSE IN CAMDEN AND TRUCK IT RIGHT OVER TO PHILADELPHIA AND PAY ME 42 BUCKS AND BE DONE WITH IT. IT CAN'T

DO THAT UNDER THE CURRENT FLOW REGULATIONS AND THEY CAN'T DO THAT EVEN UNDER AN EXPANSIVE READING OF PEREIRA, BECAUSE THEY WOULD BE REQUIRED TO TAKE 90 PERCENT OF THE WASTE AND SHIP IT BACK TO NEW JERSEY, WHICH THEY CLEARLY DO NOT DO FOR 42 DOLLARS A TON.

(13) THE LEGAL ANALYSIS IN THIS CASE COULD BEGIN AND END WITH THE *FILIBERTO* CASE, WHICH IS VERY MUCH ON POINT. INDEED, THE ONLY REAL DIFFERENCE BETWEEN THAT CASE AND THE ONE AT BAR IS THAT THE PLAINTIFF WAS A HAULER RATHER THAN A MRF OR TRANSFER STATION AND THE ONLY FLOW DIRECTIVE AT ISSUE WAS HUNTERDON COUNTY'S, RATHER THAN FLOW DIRECTIVES GENERALLY. NOT ONLY AM I BOUND BY THE THIRD CIRCUIT PRECEDENT, IN AT LEAST THIS INSTANCE, I AGREE WITH IT AND ADOPT IT AS MY OWN, THE LEGAL CONCLUSIONS SET FORTH THEREIN.

A. NEW JERSEY'S WASTE FLOW DIRECTIVES ARE CLEARLY NOT PROTECTIONIST RULES DESIGNED TO PROTECT NEW JERSEY ECONOMIC INTERESTS AND ARE NOT PER SE INVALID, BUT RATHER, BUT RATHER [p. 42] SUBJECT TO THE BALANCING TEST OF *PIKE VS. BRUCE CHURCH*, 397 U.S. 137, 142, 1970). INDEED, TO THE EXTENT, AS PLAINTIFF ARGUES, THAT NEW JERSEY CITIZENS ARE BURDENED BY HIGH DISPOSAL COSTS RESULTING FROM THESE AND RELATED REGULATIONS, IT IS FURTHER PROOF OF LACK OF DISCRIMINATORY INTENT. AS NOTED AT PAGE 921 OF *FILIBERTO*, "THE EXISTENCE OF SUBSTANTIAL IN-STATE INTERESTS HARMED BY

A REGULATION IS A POWERFUL SAFEGUARD AGAINST LEGISLATIVE DISCRIMINATION."

B. AT THE ROOT OF THE CASE IS THE LONG TERM STATE POLICY THAT WASTE GENERATED IN THIS STATE BE DISPOSED OF IN THIS STATE AND, AS A COROLLARY THE SAME RULE IS GENERALLY APPLIED ON A COUNTY BY COUNTY BASIS. THERE IS A STRONG, IF NOT OVERWHELMING EVIDENCE THAT THIS IS A SOUND POLICY ADOPTED IN AN AREA WHICH IS CLEARLY AFFECTED BY THE PUBLIC INTEREST AND WHICH REQUIRE SUBSTANTIAL GOVERNMENT REGULATIONS. IT IS REALLY UNDISPUTED THAT WASTE DISPOSAL PLANS MUST BE MADE ON A LONG-RANGE BASIS, AND LONG-TERM RELIANCE ON OUT-OF-STATE DISPOSAL SOURCES MUST BE DEEMED RISKY SINCE NEW JERSEY CANNOT CONTROL EITHER THE PRIVATE OR PUBLIC ENTITIES ENGAGED IN THESE ACTIVE OUT-OF-STATE.

C. IN ADDITION TO THE WISDOM OF PROVIDING IN-STATE DISPOSAL, MINIMIZING THE MOVEMENT OF WASTE TO SEVERAL OTHER BENEFITS. IT MAKES THE ENFORCEMENT OF WASTE DISPOSAL REGULATIONS MUCH EASIER FOR THE OBVIOUS REASON THAT DIRECTING FLOW AND LIMITING MOVEMENT MAKES IT EASIER FOR [p. 43] ENFORCEMENT OFFICIALS TO KEEP AN EYE ON THINGS. LIMITING THE MOVEMENT OF WASTE HAS CLEAR ENVIRONMENTAL BENEFITS AS ANYONE WHO HAS DRIVEN BEHIND A WASTE TRUCK KNOWS. THE AVAILABILITY OF WASTE ALSO HELPS INSURE THE FINANCIAL VISIBILITY OF THE VARIOUS EXPENSIVE

FACILITIES WHICH MUST BE OPERATED TO DISPOSE OF THE WASTE STREAM. NEW JERSEY MUST BUILD AND OPERATE FACILITIES GEARED TO HANDLE A WASTE STREAM OVER A LONG PERIOD. IF NO WASTE IS AVAILABLE, THE FINANCING OF THESE FACILITIES IS JEOPARDIZED. IN SHORT, NEW JERSEY OVER THE LAST 15 YEARS HAS ADOPTED AND IMPLEMENTED A COMPLEX, INTEGRATED STRATEGY FOR DEALING WITH A SERIOUS CRISIS IN AN AREA OF PECULIAR GOVERNMENT CONCERN. WHILE INTERSTATE COMMERCE MAY BE INCIDENTALLY AFFECTED, ANY REASONABLE APPLICATION OF THE BALANCING TEST DEMONSTRATES THAT LEGITIMATE LOCAL CONCERNS FAR OUTWEIGH ANY NEGATIVE IMPACT ON INTERSTATE COMMERCE. INDEED, IT MAY NOT BE TOO MUCH TO SAY THAT THE STATE'S ABILITY TO REGULATE SOLID WASTE DISPOSAL WOULD BE SEVERELY IMPAIRED IF IT COUNT NOT ISSUE FLOW DIRECTIVES OF THE TYPE CONTAINED IN N.J.A.C. 7:26-6.5. I BELIEVE A GOOD ANALOGY, ALTHOUGH I HAVE BEEN GIVING BAD GRADES FOR ANALOGIES, AND MAY RECEIVE ONE, ONE ANALOGY IS SEWER TREATMENT PLANT. THE STATE GOT ABOUT BUILDING VERY EXTENSIVE SEWER TREATMENT PLANTS AND PARALLEL REGULATIONS REQUIRING MOST SOURCES OF SEWAGE TO SEND THEIR SEWAGE TO PARTICULAR PLANTS. IF SOME PLANT, SOMEBODY SENT A TRUCK TO [p. 44] TAKE THE STUFF AWAY FOR CHEAPER DISPOSAL IN PHILADELPHIA, YOU WOULD HAVE VERY SEVERE IMPACT ON THE OVERALL PLANNING AND FINANCING OF THESE TYPES OF FACILITIES.

(14) I NOTE THAT A SIMILAR HOLDING IN *FILIBERTO* MAY BE FOUND *CLARKSTOWN VS. C & A CARBONE*, 587 N.Y.S. 2ND 681, NEW YORK APPELLATE DIVISION, 1992, A CASE IN WHICH CERT HAS APPARENTLY BEEN GRANTED BY THE U.S. SUPREME COURT AFTER CERT WAS DENIED BY THE NEW YORK COURT OF APPEALS.

(15) I FIND THE DECISION IN *SPORHASE VS. NEBRASKA*, 458 U.S. 941, 1981, TO BE VERY INSTRUCTIVE. IN THAT CASE THERE WERE FOUR CONDITIONS TO THE INTERSTATE TRANSFER OF NEBRASKA GROUNDWATER TO NEIGHBORING STATES. THE FOURTH CONDITION, THAT THE NEIGHBORING STATE RECIPROCALLY PERMIT THE TRANSFER OF THE GROUNDWATER TO NEBRASKA, WAS HELD TO BE UNCONSTITUTIONAL RESTRAINT ON COMMERCE WHICH BORE NO LEGITIMATE RELATION TO A PROPER GOVERNMENTAL END. HOWEVER, THE FIRST THREE CONDITIONS, WHICH WERE APPLIED TO INTERSTATE, BUT NOT INTRASTATE, TRANSFERS, WERE SUSTAINED AS LEGITIMATE EXERCISES OF STATE POWER, DESPITE THE NEGATIVE EFFECT ON COMMERCE. I.E. THE SALE OF WATER. THESE CONDITIONS WERE, A, THE WITHDRAWAL OF WATER BE REASONABLE, B, THAT IT NOT BE CONTRARY TO THE CONSERVATION AND USE OF GROUNDWATER AND, C, THAT IT NOT BE CONTRARY TO THE PUBLIC INTEREST. MOREOVER, ANY SUCH TRANSFER REQUIRED A STATE PERMIT. THESE CONDITIONS WERE HELD TO BE CONSTITUTIONALLY VALID [p. 45] NOTWITHSTANDING THEIR

OBVIOUS IMPACT ON INTERSTATE COMMERCE. JUSTICE STEVENS WROTE: "ALTHOUGH COMMERCE CLAUSE CONCERNS ARE IMPLICATED BY THE FACT THAT SECTION 46-613.01 APPLIES TO INTERSTATE TRANSFERS, BUT NOT TO INTRASTATE TRANSFERS, THERE ARE LEGITIMATE REASONS FOR THE SPECIAL TREATMENT ACCORDED REQUESTS TO TRANSPORT GROUNDWATER ACROSS STATE LINES. OBVIOUSLY, A STATE THAT IMPOSES SEVERE WITHDRAWAL AND USE RESTRICTIONS ON ITS OWN CITIZENS IS NOT DISCRIMINATING AGAINST INTERSTATE COMMERCE WHEN IT SEEKS TO PREVENT THE UNCONTROLLED TRANSFER OF WATER OUT OF THE STATE. AN EXEMPTION FOR INTERSTATE TRANSFER WOULD BE INCONSISTENT WITH THE IDEAL OF EVENHANDEDNESS IN REGULATION. AT LEAST IN THE AREA IN WHICH APPELLANTS' NEBRASKA TRACT IS LOCATED, THE FIRST THREE STANDARDS OF SECTION 46-613.01 MAY WELL BE NO MORE STRICT IN APPLICATION THAN THE LIMITATIONS UPON INTRASTATE TRANSFERS IMPOSED BY THE UPPER REPUBLICAN NATURAL RESOURCES DISTRICT.

MOREOVER, IN THE ABSENCE OF A CONTRARY VIEW EXPRESSED BY CONGRESS, WE ARE RELUCTANT TO CONDEMN AS UNREASONABLE, MEASURES TAKEN BY A STATE TO CONSERVE AND PRESERVE FOR ITS OWN CITIZENS THIS VITAL RESOURCE IN TIMES OF SEVERE SHORTAGE. OUR RELUCTANCE STEMS FROM THE "CONFLUENCE OF SEVERAL REALITIES." CITING *HICKLIN VS. ORBECK*, 437 U.S. 518, 534, 1978.

THE CONTINUANCE OF SEVERE REALITIES ARE THOSE TO WHICH [p. 46] I HAVE ALREADY REFERRED IN THE REJECTION OF NEW JERSEY'S CURRENT SOLID WASTE DISPOSAL SYSTEM.

THE ANALOGY TO OUR CASE IS COMPELLING. FLOW DIRECTIVES APPLY EVEN HANDEDLY TO GARBAGE WHICH MOVES INTERSTATE AS WELL AS INTRASTATE. AND THERE CAN BE NO DOUBT THAT TO THE EXTENT THE WASTE STREAM IS A "VITAL RESOURCE" IN THE OVERALL SOLID WASTE MANAGEMENT SYSTEM, ITS CONTROL IS OF VITAL CONCERN TO THE STATE. MOREOVER, AS IN NEBRASKA, NEW JERSEY DOES NOT HAVE AN ABSOLUTE BAN ON INTERSTATE SHIPMENT OF WASTE. RATHER, THE FLOW IS CONTROLLED TO ACHIEVE OVERALL STATE GOALS.

(15) THIRD CIRCUIT JURISPRUDENCE IN RELATED TYPES OF CASES EMPHASIZE THE NEED TO APPLY THE BALANCING TEST IN AREAS WHERE REVIEWING LEGISLATION IN AREAS OF PECULIAR STATE INTEREST, WHICH CERTIANLY [sic] INCLUDED SOLID WASTE MANAGEMENT AND IS CONSISTENT WITH DECISIONS ARE CONSISTENT WITH *FILIBERTO. NORFOLK SOUTHERN CORPORATION VS. OBERLEY*, 822 F.2D 388, THIRD CIRCUIT, 1987; *OLD BRIDGE CHEMICALS VS. N.J.D.E.P.*, 965 F.2D 1287, THIRD CIRCUIT, 1992; AND *HARVEY & HARVEY VS. DELAWARE SOLID WASTE AUTHORITY*, 600 F. SUPP. 1369, 1985, ALL UPHELD STATE REGULATORY MEASURES NOTWITHSTANDING INCIDENTAL BURDENS ON INTERSTATE COMMERCE. THE HARVEY & HARVEY OPINION WAS DECIDED BY JUDGE STAPLETON WHILE A DISTRICT

COURT JUDGE, NOW ON THE THIRD CIRCUIT. I DON'T KNOW IF IT MAKES IT A THIRD CIRCUIT OPINION OR NOT.

[p. 47] (16) PLAINTIFF ARGUES THAT *FILIBERTO* SHOULD BE DISREGARDED BECAUSE OF THE POOR RECORD MADE IN THAT CASE. I REFER TO COLLOQUY FOR THE ARGUMENTS THAT WERE MADE WHY THAT RECORD WAS NOT FULSOME. I CANNOT SO EASILY DISREGARD A THIRD CIRCUIT OPINION, PARTICULARLY ONE WHICH TRULY SETS UP THE ISSUE VERY, VERY SQUARELY. AS THE TESTIMONY IN THIS CASE SHOWS, THE ECONOMIC INTERESTS OF THE HAULER AND THE MRF OR TRANSFER STATION WITH RESPECT TO A FLOW DIRECTION REGULATIONS ARE REALLY IDENTICAL. *FILIBERTO* VERY SQUARELY PRESENTS THE ISSUE RAISED IN THIS CASE.

PLAINTIFF ALSO ARGUES THAT *FORT GRATIOT* IMPLICITLY OVERRULES *FILIBERTO*. I DISAGREE. *FORT GRATIOT* MEARLY [sic] REAFFIRMS THE 1977 NEW JERSEY CASE WHICH SAYS THAT A STATE CANNOT BAN OUT-OF-STATE GARBAGE SIMPLY BECAUSE IT COMES FROM OUT-OF-STATE AND THAT THIS BAN IN NOT CURED BECAUSE THERE IS A SIMILAR BAN BETWEEN COUNTIES IN MICHIGAN. WHAT I FOUND COMPELLING IN THAT CASE, THERE WAS NOT A HINT AND THE COURT SO STATED SQUARELY, THAT THERE WAS ANY PUBLIC POLICY OF ANY KIND BEHIND THE BAN OTHER THAN MAKING SURE THAT OUT-OF-STATE INTERESTS DID NOT BENEFIT FROM THE STATE'S PRIVATELY OPERATED LANDFILLS. AS NOTED IN COLLOQUY THE COURT

EXCLUDED CONSIDERATION OF PUBLICLY OPERATED FACILITIES. THAT CASE, THAT CASE, *FORT GRATIOT*, BESPEAKS A VERY SPARCE RECORD OF THE KIND THAT ROSEN WAS TALKING ABOUT. THIS IS A FAR CRY FROM THE ELABORATE SYSTEM OF CONTROLLING THE WASTE STREAM [p. 48] ADOPTED IN NEW JERSEY, INCLUDING THE FLOW DIRECTIVES AT ISSUE IN THIS CASE.

PLAINTIFF ARGUES THAT, PARTICULARLY IN THIS CASE, THAT EVEN THE OBJECTIVES OF THE NEW JERSEY PLAN ARE NOT BEING CARRIED OUT; FOR ONE REASON OR ANOTHER THIS WASTE COULD BE MORE EFFECTIVELY DISPOSED OF AT HIS FACILITY AT A LOWER COST AND NO ENVIRONMENTAL NEGATIVES, WITH MORE RECYCLING AND SAVING NEW JERSEY LANDFILL SPACE. SOME HOW OR OTHER THE FACT THE NEW JERSEY LEGISLATIVE GOALS ARE NOT BEING CARRIED OUT IS SOME HOW A REASON FOR NOT ENFORCING IT. QUITE OBVIOUSLY WHEN A STATE ADOPTS A VERY INTRICATE LEGISLATIVE SCHEME AND BASES THAT LEGISLATIVE SCHEME OR PLAN ON FIVE OR SIX BASIC FINDINGS, EVERY SINGLE REGULATION AND EVERY SINGLE DECISION MADE PURSUANT TO THAT PLAN IS NOT GOING TO CARRY OUT EVERY SINGLE GOAL. IT IS NOT FOR ME TO DECIDE IF THE PLAN COULD HAVE BEEN IMPLEMENTED IN A BETTER MANNER OR WHETHER THERE WAS SOME OTHER WAY THE STATE COULD HAVE DONE IT. RATHER, IT IS FOR ME TO DECIDE IF THE STATE HAS ACTED FOR PROTECTIONIST REASONS OR TO DEAL WITH A SERIOUS PROBLEM OF PUBLIC INTEREST.

HERE, WHERE I HAVE A THIRD CIRCUIT OPINION, I'M NOT ON POINT, CLOSE TO ON POINT, TWO OR THREE OTHER CIRCUIT CASES WHICH ARE SUPPORTIVE OF THAT OPINION, I SIMPLY CANNOT SAY THAT ON THE MERITS OF THIS CASE THE PLAINTIFF HAS A LIKELIHOOD OF SUCCESS.

[p. 49] SO FOR THAT REASON AND ALL THE OTHER REASONS I HAVE OUTLINED, THE PLAINTIFF'S APPLICATION FOR PRELIMINARY-INJUNCTION WILL BE DENIED AND AN ORDER WILL BE ENTERED BY THE COURT. IT WILL PROBABLY BE IN THE MORNING CONSIDERING THE HOUR.

I DON'T WANT TO HEAR REARGUMENT. ANYTHING FURTHER THAN REARGUE?

MS. BRAND: JUST A QUESTION. THE STATE FILED A MOTION FOR SUMMARY JUDGMENT AS WELL. IS THAT BEING ADDRESSED TODAY?

THE COURT: THE ANSWER IS, NO. I'M NOT GOING TO ADDRESS IT TODAY. AT THIS POINT I'M DENYING, MAYBE I SHOULD HAVE FOCUSED ON IT. LET ME PUT IT THIS WAY, I DON'T KNOW IF EITHER OF YOU WANT TO MAKE A BIGGER RECORD, A BETTER RECORD OR MORE COMPLETE RECORD. THERE ARE A LOT OF AREAS – I COULD HAVE DECIDED THE CASE ON AFFIDAVITS. I DID IT TO MAKE A BETTER RECORD. CLEARLY THERE ARE CONTESTED ISSUES OF FACT. CERTAINLY SOME CONTESTED. I HATE TO BRING UP THE PEREIRA MEMORANDUM, BUT ISSUES OF FACT. FINANCIAL INFORMATION FOR INSTANCE. AT THIS POINT IT WASN'T BRIEFED IN A SUMMARY JUDGMENT BASIS, SO I'M GOING TO

TREAT IT AS A DENIAL OF A PRELIMINARY INJUNCTION.

IF BOTH PARTIES AGREED THAT I SHOULD DECIDE IT ON THE RECORD BEFORE ME, I WILL DO SO. IF THE PARTIES BOTH THOUGHT YOU OBVIOUSLY WOULD AGREE – IT REALLY IS IF MR. REASON [p. 50] WOULD AGREE, IF THEY THINK THE RECORD IS ADEQUATE FOR WHATEVER APPEAL HE WOULD WANT TO TAKE, THAT'S A DIFFERENT STORY.

MR. ROSEN: THE ANSWER, YOUR HONOR, IS I HAVE NO OBJECTION TO YOUR DECIDING THE SUMMARY JUDGMENT MOTION AS A SUMMARY JUDGMENT MOTION. THE ISSUE OF WHETHER ON THE ASSUMPTION YOU MIGHT DENY SUMMARY JUDGMENT ON DISPUTED ISSUES OF FACT, BUT THE LEGAL DETERMINATIONS, I WOULD LIKE AN OPPORTUNITY TO SPEAK TO MY CLIENT. BUT I WOULD HOPE IF ANY FURTHER PROCEEDINGS, THAT THEY COULD BE SCHEDULED IN A WAY I DON'T HAVE TO CHOSE BETWEEN – THE DEADLINE OBVIOUSLY STARTS FROM THE ENTRY OF YOUR HONOR'S ORDER DENYING MY PRELIMINARY INJUNCTION, ON THE APPEAL OF THAT, AS OPPOSED TO APPEAL FROM A FINAL ORDER.

THE COURT: SORRY, I DON'T FOLLOW YOU. YOU HAVE AN ALL WRITS RIGHT.

MR. ROSEN: I CAN GO UP NOW.

THE COURT: WHETHER A FINAL JUDGMENT OR NOW YOU HAVE A RIGHT OF APPEAL.

MR. ROSEN: RIGHT. HERE IS THE ANSWER, AND OBVIOUSLY MY CLIENT IS IN THE BACK, I HAVEN'T SPOKEN TO HIM SINCE YOUR HONOR GAVE THE RULING. I DON'T RECALL WHAT THE RULE IS, BUT I HAVE A CERTAIN NUMBER OF DAYS FROM THE TIME YOUR HONOR SIGNS THE ORDER, PRESUMABLY TOMORROW, I WOULD LIKE TO –

[p. 51] THE COURT: YES.

MR. ROSEN: TO APPEAL TO THE THIRD CIRCUIT ON THE GROUND OF DENIAL OF A MOTION FOR PRELIMINARY INJUNCTION.

THE COURT: YES.

MR. ROSEN: ONCE YOUR HONOR RULES ON THE MOTION FOR SUMMARY JUDGMENT, IF YOUR HONOR WOULD GRANT IT, AND OBVIOUSLY NOT CONCEDING THE POINT, BUT IF YOU GRANT IT, THEN IT WOULD BE A FINAL ORDER AND CERTAIN PERIOD OF TIME FOR THAT. WHAT I WOULD HOPE IS IF, AFTER CONFERRING WITH MY CLIENT, IF WE WANT TO COME BACK AND, FOR EXAMPLE, EXPAND THE RECORD AS TO FINANCIAL INJURY TO US, THAT IT COULD BE SCHEDULED IN SUCH A WAY SO THAT I WOULDN'T HAVE TO CHOSE [sic] BETWEEN RUSHING TO THE COURTHOUSE TO FILE MY APPEAL ON THE PRELIMINARY INJUNCTION INSTEAD OF RUSHING TO THE COURTHOUSE TO FILE MY APPEAL ON THE FINAL ORDER. BECAUSE OBVIOUSLY THERE ARE, TO SOME EXTENT, DIFFERENT ISSUES IF [sic] TERMS OF THE STANDARD OF REVIEW. THAT WOULD BE MY ONLY QUESTION. A SCHEDULING THING. I CAN'T ANSWER TODAY

RIGHT NOW IN TERMS OF CLOSING THE RECORD. I DO NOT OBJECT TO YOUR HONOR ACTING ON THE SUMMARY JUDGMENT MOTION BECAUSE FRANKLY, AND I HAVE LOST SO FAR, MAYBE I'M BATTING 1,000, I CANNOT CONCEDE CONSISTENT WITH RULE 56 HOW IT COULD BE GRANTED, BECAUSE THEY DID NOT SUBMIT THE RULE 12(G) STATEMENT. I SUBMITTED AN AFFIDAVIT EXPLAINING THE FACTUAL ISSUES –

THE COURT: I WILL DO – I WON'T DEAL WITH THE [p. 52] SUMMARY JUDGMENT MOTION TODAY. GIVEN THE FACT WE DECIDED THE PRELIMINARY INJUNCTION, I QUITE CORRECTLY DID NOT REVIEW IT FROM THAT STANDARD IN APPLYING THE STANDARD OF REVIEW, FROM THAT POINT OF VIEW. TECHNICALITIES OF THE RULE HAVE NOT BEEN COMPLIED WITH. NO WAY OF CRITICISM OF ANYONE. YOU'RE FOCUSING ON THE INJUNCTION. I'LL STICK TO MY ORIGINAL POINT AND GIVE YOU TIME TO CONSULT RIGHT NOW. I'M NOT BEATING YOU TO THE DOOR. I'LL GIVE YOU A HALF-AN-HOUR TO CONSULT. I'LL MAKE A FINAL DECISION. IF YOU STIPULATE THE RECORD WHICH IS PRETTY EXTENSIVE, EXCEPT IN ONE REGARD, AND ALSO MAKE IT A FINAL JUDGMENT, IT ELIMINATES ALL THE ISSUES ABOUT THE FINANCIALS. I BELIEVE THE FINANCIAL CONDITION IS RELEVANT ONLY TO THE PRELIMINARY INJUNCTION. I DON'T THINK HAS A WHIT OF RELEVANCE TO THE FINAL ISSUE.

MR. ROSEN: THAT'S MY UNDERSTANDING.

THE COURT: UNLESS I AM MISSING IT, THEY COULD LOSE MONEY DOING NEW JERSEY BUSINESS AND IT IS THEIR RIGHT. THEY HAVE A CONSTITUTIONAL RIGHT TO DO WHAT THEY WANT TO DO. BUT THE STATE DOESN'T HAVE A CONSTITUTIONAL RIGHT TO DO WHAT IT IS DOING. THE FACT THEY ARE LOSING MONEY WOULD BE AN IRRELEVANCY. ONE THING YOU DO BY AGREEING TO A FINAL JUDGMENT NOW, YOU GET IT OUT OF THE CASE.

MR. ROSEN: MAY WE GO OFF THE RECORD?

THE COURT: NO. RATHER THAN THAT, RIGHT NOW YOU KNOW WHAT MY RULING IS. I'LL ADJOURN THE HEARING RIGHT NOW [p. 53] FOR A HALF-AN-HOUR. I'LL GIVE YOU TIME TO TALK TO YOUR CLIENT AND ALSO TALK TO ME IN CHAMBERS IF YOU WANT TO.

MR. ROSEN: THAT WOULD BE HELPFUL.

THE COURT: EITHER ONE OF THOSE TWO THINGS OR BOTH.

WE WILL RESUME – IF YOU DON'T WANT TO DO ANYTHING, YOU DON'T HAVE TO GO BACK. THAT WILL BE THE END OF IT. BUT ANY REASON YOU WANT ME TO, I DON'T HAVE THE RULE TO CITE, BUT IT PROVIDES I CAN TREAT A PRELIMINARY INJUNCTION AS A FINAL HEARING.

MR. ROSEN: I UNDERSTAND THAT.

THE COURT: I'LL HAVE THE RULE CITED.

IF YOU AGREE, I'LL GO BACK ON THE THE [sic] RECORD AND MAKE MY RULING, WHICH I THINK THE RESULT IS PREDICTABLE. I CAN SEE SOME ADVANTAGE TO YOU DOING THAT. ONLY DISADVANTAGE WOULD BE SOME PIECE OF A RECORD THAT I CAN'T RIGHT NOW THINK OF.

MR. ROSEN: I UNDERSTAND.

THE COURT: THAT YOU WOULD WANT TO CONSENT TO. I DON'T KNOW. I'LL GO OFF RECORD NOW AND TERMINATE THE PROCEEDINGS, ADJOURN FOR THE DAY.

(AT WHICH TIME THE MATTER WAS CONCLUDED)

[p. 54] CERTIFICATE

I, STEPHEN J. DANER, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CERTIFIED SHORTHAND REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPTION OF MY ORIGINAL STENOGRAPHIC NOTES TO THE BEST OF MY ABILITY OF THE MATTER HEREINBEFORE SET FORTH.

/s/ S. Daner
STEPHEN J. DANER
OFFICIAL U.S. REPORTER
N. J. CERTIFICATE
NO. X101514

DATE: 1-5-94

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ATLANTIC COAST DEMOLITION & RECYCLING, INC., Plaintiff	HONORABLE JOSEPH E. IRENAS
v.	CIVIL ACTION NO. 93-2669 (JEI)
BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, POLLUTION CONTROL FINANCING AUTHORITY OF ATLANTIC COUNTY, BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY, ATLANTIC COUNTY UTILITIES AUTHORITY and SCOTT A. WEINER, individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy, Defendants	**ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** (Filed Sept. 10, 1993)

APPEARANCES:

Mark R. Rosen
Jodi Isenberg
MESIROV GELMAN JAFFE CRAMER & JAMIESON
44 Tanner Street, P.O. Box 183
Haddonfield, NJ 08033
Attorney for Plaintiff

Gail M. Lambert
Stefanie A. Brand
Deputy Attorney General
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, NJ 07101
Attorneys for Defendants

Leslie G. London
McMANIMON & SCOTLAND
One Gateway Center
Newark, NJ 07102
Attorney for *Amici Curiae* Mercer County Improvement Authority and Gloucester County Improvement Authority

IRENAS, District Judge,

This matter having come before the Court on September 8, 1993, on plaintiff, Atlantic Coast Demolition & Recycling, Inc.'s motion for a temporary restraining order and preliminary injunction pursuant to Fed. R. Civ. P. 65, and the Court having reviewed the briefs in support and in opposition, as well as the briefs submitted by *amici curiae,* and having heard the arguments of the parties, for the reasons set forth in an opinion delivered in open court comprising findings of fact and conclusions of law, which opinion is incorporated herein by reference, and good cause appearing.

IT IS on this 10th day of September, 1993,

ORDERED THAT the plaintiff, Atlantic Coast Demolition & Recycling, Inc.'s motion for temporary restraining order and preliminary injunction is hereby **DENIED.**

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ATLANTIC COAST DEMOLITION & RECYCLING, INC., Plaintiff	HONORABLE JOSEPH E. IRENAS
v.	CIVIL ACTION NO. 93-2669 (JEI)
BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, POLLUTION CONTROL FINANCING AUTHORITY OF ATLANTIC COUNTY, BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY, ATLANTIC COUNTY UTILITIES AUTHORITY and SCOTT A. WEINER, individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy, Defendants	**ORDER DENYING PLAINTIFF'S MOTION TO PLACE THE CASE IN THE SUSPENSE DOCKET, AND, IN THE ALTERNATIVE, TO DISMISS THE ACTION WITHOUT PREJUDICE AND ORDER ENTERING FINAL JUDGMENT**

APPEARANCES:

MESIROV GELMAN JAFFE CRAMER & JAMIESON
By: Mark R. Rosen, Esq.
Stephen Bayer, Esq.
44 Tanner Street, P.O. Box 183
Haddonfield, NJ 08033
Attorneys for Plaintiff

FRED DE VESA, ACTING ATTORNEY GENERAL
Gail M. Lambert, D.A.G.
Stefanie A. Brand, D.A.G.
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, NJ 07101
Attorneys for Defendants

IRENAS, District Judge:

This matter having come before the Court on plaintiff's motion for leave to place this action in the "suspense" docket, or, in the alternative, to dismiss the action without prejudice, and the Court having reviewed the briefs in support and in opposition, and having heard the arguments of the parties, and neither party having desired to submit additional evidence, for the reasons set forth in an opinion delivered in open court on even date herewith, which opinion is incorporated herein by reference, and good cause appearing.

IT IS on this 28th day of February, 1994,

ORDERED THAT

1. Plaintiff's motion for leave to place this action in the "suspense" docket, or, in the alternative, to dismiss the action without prejudice is hereby **DENIED**; and

2. Based on the findings of fact and the conclusions of law stated in the oral opinion delivered by this Court on September 8, 1993, final judgment is **ENTERED** in favor of the defendants pursuant to Fed. R. Civ. P. 52 and 58.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
U.S.D.J.

APPENDIX E

ATLANTIC COAST DEMOLITION & RECYCLING, INC., Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY; Atlantic County Utilities Authority; Board of Chosen Freeholders of Camden County; Pollution Control Financing Authority of Camden County; Scott A. Weiner, Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy, Defendants,

Mercer County Improvement Authority; Hudson County Improvement Authority; Essex County Utilities Authority; Passaic County Utilities Authority; Cape May County Municipal Utilities Authority; Camden County Energy Recovery Associates, L.P., Intervenor-Defendants

C & A CARBONE, INC.; Bret Schundler, Mayor, in his capacity as Mayor of city of Jersey City; John Rooney, Mayor, in his capacity as Mayor of Borough of Northvale; National Solid Waste Management Association, New Jersey Chapter; Waste Management Association of New Jersey; City of Passaic; City of Paterson; Dwight Destefan, Mayor, Individually and in his capacity as Mayor of the Township of River Vale, Plaintiffs,

v.

Robert C. SHINN, Jr., Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and

Energy; New Jersey Department of Environmental Protection and Energy; Larry J. McClure, Individually and in his official capacity as Executive Director of the Bergen County Utilities Authority; Bergen County Utilities Authority; Mark Guarino, Individually and in his official capacity as Director of the Bergen County Health Department; Bergen County Health Department; Kenneth Blane, Individually and in his official capacity as Executive Director of the Hudson County Improvement Authority; Hudson County Improvement Authority; Carol Ann Wilson, Individually and in her official capacity as Director of the Hudson County Health Department; William P. Schuber, Individually and in his official capacity as County Executive for Bergen County; Robert C. Janiszewski, Individually and in his official capacity as County Executive for Hudson County; Passaic County Utilities Authority; Anthony Ross, Individually and in his capacity as Executive Director; Nicola R. Didonna, Individually and in his capacity as County Executive for the County of Passaic.

National Solid Wastes Management Association; Waste Management Association of New Jersey; and C & A Carbone, Appellants in 96-5567.

New Jersey Department of Environmental Protection; Scott A. Weiner; and Robert C. Shinn, Jr., Commissioner, Appellants in 96-5568.

Cape May County Municipal Utilities Authority ("CMCMUA"), Appellants in 96-5569.

Essex County Utilities Authority; Hudson County Improvement Authority; Mercer

County Improvement Authority; Mercer County Improvement Authority; and Passaic County Utilities Authority, Appellants in 96-5570.

Nos. 96-5567 to 96-5570.

United States Court of Appeals,
Third Circuit.

Argued Dec. 17, 1996.
Decided May 1, 1997.

Out-of-state waste processing facilities and businesses engaged in collection and disposal of solid waste in New Jersey and surrounding states brought action against New Jersey Department of Environmental Protection (NJDEP) and various county authorities, challenging constitutionality of New Jersey's waste flow control laws under dormant commerce clause. The United States District Court, District of New Jersey, Joseph E. Irenas, J., 931 F.Supp. 341, held that waste flow control laws violated commerce clause, thus warranting injunction against enforcement, but stayed injunction to allow time to devise nondiscriminatory alternative. On cross-appeals, the Court of Appeals, Roth, Circuit Judge, held that: (1) district court properly applied heightened scrutiny test; (2) NJDEP failed to show that New Jersey lacked alternative nondiscriminatory means of achieving state interests; (3) injunction would not bar enforcement of portions of New Jersey's Solid Waste Management Act (SWMA) or Solid Waste Utility Control Act (SWUCA) other than regulatory codification of designated facilities for waste disposal and implementation of self-sufficiency policy precluding designation of out-of-state waste disposal

facilities; but (4) district court exceeded its equitable discretion in imposing two-year post-appeal stay of injunction.

Affirmed in part, injunction issued, and reversed in part.

Mark R. Rosen (argued), Mesirov, Gelman, Jaffe, Cramer & Jamieson, Haddonfield, New Jersey, for Appellee Atlantic Coast Demolition & Recycling, Inc.

Betty J. Christian (argued), Paul J. Ondrasik, Jr., William T. Hassler, David A. Stein, Steptoe & Johnson, L.L.P., Washington, D.C., and Joseph Torre, Torre & Torre, Hasbrouck Heights, New Jersey, for Appellants National Solid Wastes Management Association; C & A Carbone, Inc; and Waste Management Association of New Jersey.

Peter Verniero, Attorney General of New Jersey, Division of Law, Trenton, New Jersey, Andrea M. Silkowitz, Assistant Attorney General, Gail M. Lambert (argued), and Stefanie A. Brand, Deputy Attorneys General of New Jersey, Newark, New Jersey, for Appellees Robert C. Shinn, Jr.; Scott Weiner, Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy, and New Jersey Department of Environmental Protection.

Barbara H. Parker, Office of County Counsel, Hackensack, New Jersey, for Appellees Mark Guarino, Individually and in his official capacity as Director of the Bergen County Health Department, and William P. Schuber, Individually and in his official capacity as County Executive for Bergen County.

Thomas S. Higgins, Higgins, Long & Bonfiglio, Laurel Springs, New Jersey, for Appellee Cape May County Municipal Utilities Authority.

J. Sheldon Cohen (argued), DeCotiis, Fitzpatrick & Gluck, Teaneck, New Jersey, for Appellants Essex County Utilities Authority; Hudson County Improvement Authority; Mercer County Improvement Authority and Passaic County Utilities Authority.

Stephen P. Sinisi (argued) and Scott G. Sproviero, Sinisi, Van Dam, Spoviero & Sokolich, Paramus, New Jersey, for Appellee Bergen County Utilities Authority.

Gage Andretta and David J. Sprong, Wolff & Samson, Roseland, New Jersey, for Amicus Curiae, Camden County Energy Recovery Associates, L.P.

Before: STAPLETON, ROTH and GARTH, Circuit Judges

OPINION OF THE COURT

ROTH, Circuit Judge.

This case comes before us a second time for a determination whether New Jersey's regulation of the disposal of solid waste is constitutional under the Commerce Clause of the Constitution. New Jersey's "flow control" statutes require waste management districts to contract with designated waste facilities for the disposal of locally generated waste. Following the Supreme Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), we held that these laws discriminated against interstate commerce in purpose and effect by disfavoring out-of-state facilities and

inhibiting the export of solid waste from New Jersey. Atlantic Coast Demolition & *Recycling, Inc. v. Board of Chosen Freeholders of Atlantic Cty.*, 48 F.3d 701, 712-13 (3d Cir.1995) (*"Atlantic Coast I"*). We then remanded the case to the district court to determine whether the flow control laws could meet heightened scrutiny under the "dormant" Commerce Clause.[1] *Id.* at 717-18.

After hearing extensive evidence, the district court concluded that New Jersey had not met its burden of demonstrating that it lacked alternate means of achieving its legitimate interest in creating a safe and effective system for in-state solid waste disposal. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic Cty.*, 931 F.Supp. 341, 359 (D.N.J.1996). Upon finding New Jersey's flow control laws unconstitutional, the district court granted a permanent injunction both to plaintiffs who process and dispose of construction and

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[1] The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. Art. I, § 8, cl. 3. In addition to this affirmative power, the Commerce Clause also has a "negative" or "dormant" component, under which states may not erect barriers to interstate trade. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). The dormant Commerce Clause applies whenever Congress "has not affirmatively acted to either authorize or forbid the challenged state activity." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir.1987). The defendants in this case do not argue that Congress has authorized the discrimination against interstate commerce present in the New Jersey solid waste control laws.

demolition waste (so-called "C & D" waste), and to plaintiffs who process other types of solid waste.[2] The district court then issued a two-year post-appeal stay on the permanent injunction, except as it applied to processors of C & D waste. *Id.*

The Carbone plaintiffs and the defendants have appealed the district court's decision. We will affirm the district court's findings that New Jersey's flow control laws and regulations are unconstitutional insofar as they discriminate against out-of-state waste processing facilities. We will not, however, affirm the lower court's post-appeal stay because the record cannot support the district court's exercise of "equitable discretion" to delay the

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[2] The plaintiffs, who brought this action challenging the continued enforcement of New Jersey's flow control laws, are Atlantic Coast Demolition & Recycling, Inc., an out-of-state facility that processes construction and demolition debris, C & A Carbone, Inc., an out-of-state facility that processes all types of solid waste, the Waste Management Association of New Jersey and the National Solid Wastes Management Association. The latter two plaintiffs are, for the most part, small, privately held businesses engaged in the collection and disposal of solid waste in New Jersey and surrounding states. We refer to C & A Carbone and the two Association plaintiffs collectively as "Carbone plaintiffs."

The defendants are the New Jersey Department of Environmental Protection (NJDEP), the Bergen County Utilities Authority, the Hudson County Improvement Authority, the Passaic County Utilities Authority, the Mercer County Improvement Authority, the Essex County Utilities Authority, and the Cape May County Municipal Utilities Authority. With the exception of the Bergen County Utilities Authority, which has filed a separate brief, we refer collectively to the county authorities as "County Authority defendants."

enjoining of an admittedly unconstitutional regulatory system.

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

I. FACTS

As this nation's prosperity and consumption have increased over the years, so too has its solid waste. The processing and placement of garbage pose substantial economic and environmental concerns. In the past, states have attempted to meet those concerns by limiting or banning the importation of solid waste. The Supreme Court, however, has struck down these laws as unconstitutional because they discriminate against interstate commerce and thereby invoke heightened or rigorous scrutiny under the dormant component of the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992).

More recently, states and municipalities have erected barriers to the exportation of solid waste in the hope that in-state control of solid waste facilities will protect their communities from environmental harm, as well as guarantee a certain level of business for in-state processors. *See* Phillip Weinberg, Congress, the Courts, and *Solid Waste Transport: Good Fences Don't Always Make Good Neighbors*, 25 Envtl.L. 57 (1995). Like the previous bans on importation of solid waste, the locally enacted barriers

against the exportation of solid waste implicate the dormant Commerce Clause because they raise concerns about state protectionism and "balkanization." Garbage, however unpleasant or unwanted, carries substantial value for those with the desire or know-how to dispose of it. In *Carbone*, the Supreme Court held that laws limiting the export of solid waste may be subject to heightened scrutiny because "[t]he Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *Carbone*, 511 U.S. at 393, 114 S.Ct. at 1683 (striking down local ordinance requiring all solid waste to be processed through local transfer station).

The law challenged in this case falls into the second category of waste-control laws because it places barriers on the exportation of solid waste.

A. New Jersey's Regulation of the Disposal of Solid Waste

This Court has described New Jersey's comprehensive solid waste disposal system in detail in *Atlantic Coast I*, 48 F.3d at 704-708. We will provide a brief review of that system as it impacts this case.

In response to a waste disposal crisis, New Jersey enacted the Solid Waste Management Act ("SWMA"), N.J.S.A. §§ 13:1E-1 *et seq.*, and the Solid Waste Utility Control Act ("SWUCA"), N.J.S.A. §§ 48:13A-1 *et seq.* in 1970 to provide a safe, comprehensive and effective means of solid waste disposal within the state. These statutes strictly control the collection, transportation and processing of solid waste generated within the state, thus

earning the appellation "flow control laws." Under these laws, any waste disposal facility, regardless of its ownership or location, must clear two substantial hurdles before it disposes of solid waste generated within New Jersey. First, the facility must obtain a contract with one of New Jersey's twenty-two waste management districts. Unless a facility has been designated by a waste management district, that facility cannot dispose of locally generated waste. Second, even if the facility contracts with a district for service, the waste disposal facility must obtain the approval of the State's Department of Environmental Protection (hereinafter "the State" or NJDEP). Under this regime, out-of-state facilities have rarely been authorized to dispose of New Jersey's solid waste.[3]

Under SWMA, New Jersey is divided into twenty-two solid waste management districts, which include the State's twenty-one counties and the Hackensack-Meadowlands District. N.J.S.A. § 13:1E-19. The districts have formulated long-term solid waste disposal plans in accordance with the State's laws and regulations. N.J.S.A. § 13:1E-20. These plans have had to meet NJDEP's approval. *See* N.J.S.A. § 13:1E-24. Management districts have chosen between delegating their waste disposal responsibilities to designated municipal authorities within the district or exercising direct control over waste

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[3] For a discussion of the trials and tribulations of New Jersey waste authorities that have contracted with out-of-state facilities, *see Waste Management of Pennsylvania, Inc. v. Shinn*, 938 F.Supp. 1243 (D.N.J.1996).

disposal themselves.[4] Municipal authorities and districts in turn have met the State's waste disposal obligations by contracting with or operating their own waste disposal and recycling facilities.

Pursuant to the flow control laws, several waste disposal authorities have assumed substantial debt obligations to build waste disposal facilities "to assure the safe and efficient disposal of solid waste generated in their districts." *Atlantic Coast II*, 931 F.Supp. at 347 ¶ 5. The district court found that "[t]he solid waste public debt outstanding in New Jersey as of December 31, 1994, was $1.65 billion, which is the total of 53 separate bonds issued by New Jersey local authorities or counties." *Id.*, at 348 ¶ 12. Currently, the disposal facilities service their debt by charging "tipping fees" for disposing of waste.[5] The fees charged by the designated facilities are significantly higher than the fees charged by their out-of-state counterparts. *Id.*, at 349 ¶ 17.[6]

Once an authority has chosen a particular private or public entity to service its waste disposal needs, that

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[4] Of the twenty-two districts, five districts exercise direct control, eleven districts delegate responsibility to utility authorities, four delegate responsibility to improvement authorities, and two delegate responsibility to pollution control financing authorities. *Atlantic Coast II*, 931 F.Supp. at 347.

[5] "Tipping fees" are the fees charged per ton of waste disposed with the facility.

[6] The district court cites estimates that those who generate waste within the State "spend an average of $110 million per year in excess tipping fees, compared to competitive market prices, due to flow control." *Atlantic Coast II*, 931 F.Supp. at 349 ¶ 17.

entity must seek approval from NJDEP (through registration and issuance of a permit) prior to commencing service. N.J.S.A. § 13:1E-5. A facility cannot obtain a permit unless it is designated by the municipal district or authority in its waste disposal plan. N.J.S.A. § 13:1E-4(b). Regional *Recycling, Inc. v. State Dep't of Environmental Protection*, 256 N.J.Super. 94, 606 A.2d 817 (App.Div.1991). *All* waste generated within the state *must* be directed to the processing facility designated by the district or municipal authority. *See* N.J.S.A. § 48:13A-4(c). The designation of the particular facility for waste disposal in each waste management district is codified in NJDEP regulations. N.J.Admin.Code tit. 7, § 7:26-6.5 (Supp.1996).

Although a waste management district or authority may contract with an out-of-state facility for waste disposal, NJDEP's policy of attaining self-sufficiency has favored operators that have facilities within the state or that are willing to construct a facility there. *See* Atlantic Coast I, 48 F.3d at 707-708. Waste management districts desiring to enter into agreements with out-of-state facilities have had to certify to NJDEP that no other sites within the district meet the district's waste disposal needs. N.J.S.A. § 13:1E-21(b)(3). The certification provision on its face does not appear to prohibit out-of-state solid waste facility operators from competing for an agreement to process a district's waste.[7] Nevertheless, the

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[7] *Cf. Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 801 (3d Cir.1995) (explaining that to determine whether flow control schemes discriminate against interstate commerce, court must examine the designation process, the duration of the designation, and the likelihood of adding alternative sites for indications that out-of-state bidders do not enjoy equal access to the local market).

certified processors for each district, presently listed in N.J.A.C. § 7:26-6.5, have been chosen under the NJDEP policy of reducing dependence on facilities outside the state for waste disposal services. *See Atlantic Coast I*, 48 F.3d at 707 (discussing NJDEP's self-sufficiency policy). As the district court stated at the first *Atlantic Coast* trial: "Although it is not the subject of a clear legislative direction [sic], it is equally clear that [NJDEP] administers the law with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state." *Atlantic Coast I*, 48 F.3d at 707 (quoting district court) ([sic] in original). The imposition of this self-sufficiency policy on the selection of waste disposal facilities has resulted in the discrimination against out-of-state processors which we found in *Atlantic Coast I*.

Under the present flow control system, those who violate New Jersey law by disposing of solid waste at facilities not designated in N.J.A.C. § 7:26-6.5 risk the imposition of significant penalties. Section 13:1E-9 of the SWMA authorizes NJDEP's commissioner to take various civil and administrative actions against those who violate any provision of P.L.1970, c. 39 (the SWMA), or any code, rule or regulation adopted pursuant to that law. In addition, Section 13:1E-9(e) authorizes civil penalties totaling as much as $50,000 for each violation of the solid waste laws "provided that each day during which the violation continues shall constitute an additional, separate and distinct offense." N.J.S.A. § 13:1E-9(e). The State has employed this provision to penalize undesignated waste disposal facilities and enjoin them from engaging in the

unauthorized collection and disposal of solid waste generated within the state. *See e.g. State, Dep't of Environmental Protection v. Interstate Recycling, Inc.*, 267 N.J.Super. 574, 632 A.2d 526 (App.Div.1993) (NJDEP may pursue injunction against unlicensed waste disposal facility).[8]

Other provisions enforcing the requirement that waste disposal facilities be designated under N.J.A.C. § 7:26-6.5 include Section 13:1E-9.4 of SWMA, which authorizes civil forfeiture of all conveyances used or intended for use in the transport or unlawful disposal of solid waste. N.J.S.A. § 13:1E-9.4(d). In addition, persons who collect, dispose of or transport solid waste to undesignated sites subject themselves individually to civil fines of up to $10,000 for each day of violation. N.J.S.A. § 13:1E-9.4. Finally, an individual who engages in the unauthorized collection, transport or disposal of solid waste is guilty of a crime in the fourth degree, which carries with it the penalty of up to 18 months in prison. N.J.S.A. § 48:13A-12(a).

Taken as a whole, the waste disposal laws present substantial barriers to out-of-state firms wishing to collect, transport and process any of the waste generated within New Jersey. The State is able to enforce this regulatory system through its impressive array of rules, regulations, fines and other penalties.

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[8] In addition, waste disposal facilities designated as proper receptors of a particular district's waste may seek injunctive relief in state courts to prevent unauthorized diversion of waste to unauthorized facilities. *See Morris Cty. Transfer Station, Inc. v. Frank's Sanitation Service, Inc.*, 260 N.J.Super. 570, 617 A.2d 291 (App.Div.1992).

B. Procedural History

The procedural history of this case is well documented by the district court in *Atlantic Coast II*, 931 F.Supp. at 343. Atlantic Coast, a Pennsylvania corporation operating a transfer station and recycling center for construction and demolition (C & D) debris, began this action on June 23, 1993, when it filed a complaint under 42 U.S.C. § 1983 against the Commissioner of NJDEP, seeking a declaratory judgment that the codification of waste disposal designations at N.J.A.C. § 7:26-6.5 violated the Commerce Clause and seeking a permanent injunction against the enforcement of this regulation.[9] Atlantic Coast also promptly moved for a preliminary injunction.

On September 8, 1993, the district court denied Atlantic Coast's motion and found in favor of NJDEP. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 1993 U.S. Dist. Lexis 20,810 (D.N.J. Sept. 8, 1993). In doing so, the court followed our decision in J.

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[9] Atlantic Coast processes "mixed waste," such as construction and demolition debris, which contain both recyclable and non-recyclable materials. Unlike solid waste, recyclable materials may be deposited with any licensed facility, regardless of whether it has been designated and approved in a particular district's waste disposal plan. *See* N.J.S.A. § 48:13A-4; N.J.A.C. § 7:26-1.1(a)(1). Under New Jersey's solid waste disposal regulatory system, undesignated facilities may accept mixed waste, provided the facilities: (1) return the non-recyclable waste to the in-state disposal facilities once the mixed waste has been sorted; or (2) pay the tipping fees that would otherwise be charged for disposal of the non-recyclable waste. N.J.A.C. §§ 7:26-6.9, 26-2B.9.

Filiberto *Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir.1988), and analyzed New Jersey's waste disposal system under the balancing test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), rather than under the more rigorous test set forth in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). Under the *Pike* test, a statute that burdens interstate commerce will be upheld unless that burden "is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. By contrast, the *Maine* test holds that statutes that discriminate against interstate commerce are unconstitutional unless the State can demonstrate that it has no other way of achieving a legitimate interest. The district court concluded that the benefits of the State's waste disposal system outweighed the burden placed on out-of-state facilities like Atlantic Coast, and on February 24, 1994, it entered final judgment in favor of defendants. Atlantic Coast appealed.

While Atlantic Coast's appeal was pending, the Supreme Court rendered its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). In *Carbone*, the Court concluded that the town of Clarkstown's local waste control ordinance – somewhat similar to the waste control regulations in New Jersey – discriminated against interstate commerce and therefore triggered strict scrutiny under the dormant Commerce Clause. The Court then held that Clarkstown had not met this level of heightened scrutiny. *Carbone*, 511 U.S. at 393-94, 114 S.Ct. at 1684.

This Circuit then applied the principles set forth by the Supreme Court in *Carbone* to Atlantic Coast's appeal and concluded that New Jersey's waste control laws discriminated – in purpose and practical effect – against interstate commerce. *See Atlantic Coast I*, 48 F.3d at 712. We remanded the case to the district court to allow it to apply the correct test under the dormant Commerce Clause. We also provided that Atlantic Coast could reapply for injunctive relief since the district court's prior decision "was based primarily on its conclusion that Atlantic Coast had failed to demonstrate a likelihood of success on the merits of its challenge." *Atlantic Coast I*, 48 F.3d at 718. Since the applicable test entailed heightened scrutiny as defined by *Maine v. Taylor*, "the likelihood of success issue is a materially different one from that which the district court previously addressed." *Id.*

Atlantic Coast filed a new motion for a preliminary injunction on April 11, 1995. At the same time, the district court permitted several County Authorities to intervene as defendants.[10] In the meantime, on July 11, 1994, C & A Carbone Inc., a New York waste disposal facility, along with the Waste Management Association of New Jersey and the National Solid Wastes Management Association, had filed an action against NJDEP seeking declaratory and injunctive relief, as well as damages.[11] Unlike

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[10] *See* note 2, *supra*.

[11] The Carbone plaintiffs also were initially joined by "municipal plaintiffs" including the mayors of Jersey City and Northvale. The district court dismissed these plaintiffs from the case on June 9, 1995. *See Atlantic Coast*, 893 F.Supp. 301. (D.N.J.1995).

Atlantic Coast, Carbone processes all types of solid waste, not just C & D waste.[12] Carbone's case was stayed pending this Court's decision in *Atlantic Coast I*. Following our remand of *Atlantic Coast I*, the two cases were consolidated. At the request of the parties, the district court re-opened the record and extensive discovery ensued. Carbone joined Atlantic Coast in its motion for a preliminary injunction.

On June 9, 1995, the district court conditionally granted Atlantic Coast's motion for a preliminary injunction as to C & D waste but denied Carbone's, based on the court's analysis of various equitable considerations. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 893 F.Supp. 301 (D.N.J.1995).[13] The

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In addition to NJDEP, Carbone sued the Bergen County Utility Authority, which has submitted its own brief as an appellee.

[12] C & D waste constitutes approximately 12 % by weight of the waste generated by New Jersey. *See Carbone* Br., at 9.

[13] With regard to Atlantic Coast's motion, the district court provided:

> The Court shall give the state sixty days to submit a proposed alternative, non-discriminatory plan to the current waste flow regulations governing the flow of the type of waste within Atlantic Coast's . . . permit, along with a study of the possible impact of the proposed system on the state and the public. Thirty days thereafter the remaining defendants may submit a study of the possible impact of the proposed alternative regime on them. Thirty days after that Atlantic Coast may submit its objections, if any, to the state's proposed plan, and any arguments in opposition to the defendants' impact studies. The

Carbone plaintiffs did not appeal this decision. The parties then conducted additional discovery.

Finally, on July 15, 1996, the district court issued a permanent injunction in favor of the plaintiffs, concluding that the defendants had failed to uphold their burden of demonstrating under the heightened scrutiny test of the dormant Commerce Clause that they lacked alternate means of achieving their solid waste disposal program. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 931 F.Supp. 341 (D.N.J.1996) (hereinafter *Atlantic Coast II*). In entering final judgment in favor of the plaintiffs, the district court observed that "defendants have not even attempted to present a feasible nondiscriminatory alternative to the Court, but have merely caricatured each of the tools that may be used in building a new system." *Atlantic Coast II*, 931 F.Supp. at 351. However, although the court granted the Carbone plaintiffs a permanent injunction, it stayed that injunction for a period of "two years following the date on which this case is no longer subject to a right of appeal, or is no longer pending on appeal or on Petition for [Certiorari] to the United States Supreme Court." *Id.* at 358. The stay did

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Court will then consider these submissions and fashion appropriate relief.

Atlantic Coast, 893 F.Supp. at 312. Following the allotted period of time, the district court concluded that the state defendants could not establish that a preliminary injunction would cause them irreparable harm, and instituted an injunction eliminating all flow control of mixed loads of C & D waste. *See Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic Cty.*, 909 F.Supp. 229 (D.N.J.1995).

not apply to the Atlantic Coast plaintiffs, who collect and dispose only of C & D waste.

Shortly thereafter, in an unrelated proceeding, *Waste Management of Pennsylvania, Inc. v. Shinn*, 938 F.Supp. 1243 (D.N.J.1996), a New Jersey district court found that the State's policy of ensuring self-sufficient waste disposal "discriminates against out-of-state waste disposal facilities in favor of in-state economic interests without serving any legitimate local interest which could not be addressed by less restrictive means." *Waste Management*, 938 F.Supp. at 1256. Accordingly, the district court enjoined the State from taking any action to "preclude the use of out-of-state waste disposal facilities solely because said facilities are located outside of New Jersey." *Waste Management*, 938 F.Supp. at 1263. At the request of the State, the district court then modified the injunction as follows:

> ORDERED that the Commissioner of the Department of Environmental Protection is permanently enjoined from implementing New Jersey's self-sufficiency policy as mandated under the State Plan to abrogate existing valid contracts or to reject or foreshorten contracts submitted to the New Jersey Department of Environmental Protection for review.

Waste Management of Pennsylvania, Inc. v. Shinn, No. 94-1983 (D.N.J. October 29, 1996).[14]

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[14] Although the *Waste Management* case has been appealed to this Circuit, the appeal has been stayed pending our decision in this case.

This injunction recognizes the conclusion that we reached in *Atlantic Coast I* that New Jersey's flow control laws discriminate against interstate commerce. By enjoining the State's future implementation of its self-sufficiency policy, the modified injunction removes only one of the barriers to New Jersey's waste disposal market for out-of-state waste disposal facilities. The injunction does not undo the twenty-two waste management district's plans for waste disposal. Neither does the *Waste Management* injunction affect N.J.A.C. § 7:26-6.5, which codifies the twenty two districts' designations of proper facilities for waste disposal. The Carbone plaintiffs therefore remain excluded from New Jersey's waste disposal market.

II. THE APPEAL

The County Authority defendants appeal the district court's decision on the ground that the district court should not have applied heightened scrutiny to the waste flow regulations. The State appeals the district court's decision on the ground that, even if heightened scrutiny was warranted, the State established at trial that it had no other means by which to achieve its legitimate interests in guaranteeing safe and effective solid waste disposal and protecting the financial integrity of the local entities which depend on flow control laws for operating revenues and debt service. Finally, the Carbone plaintiffs appeal the district court's stay as unconstitutional.

We shall examine each of these arguments in turn.

A. Choosing the Proper Test

We first review the district court's application of the heightened scrutiny test to New Jersey's flow control laws. According to the County Authorities, the district court applied an inappropriate level of scrutiny on remand. The County Authorities also argue that the district court should have "severed" the State's policy of ensuring self-sufficient waste disposal from the rest of New Jersey's flow control statutes and then analyzed the twenty-two district waste disposal plans separately, on a district by district basis. These arguments lack merit, as they ignore our earlier decision in *Atlantic Coast I.*

A statute triggers heightened scrutiny under the dormant Commerce Clause whenever that statute has a discriminatory purpose or effect on interstate commerce. *See Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788, 797-98 (3d Cir.1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1265, 134 L.Ed.2d 213 (1996). In *Carbone,* the Supreme Court held that flow control laws that discriminate against out-of-state waste facilities trigger heightened scrutiny because they hoard a valuable economic resource such as garbage. 511 U.S. at 389-93, 114 S.Ct. at 1682-83. A discriminatory state statute is *per se* unconstitutional "save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." *Id.* at 392, 114 S.Ct. at 1683, *citing Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

Following the Supreme Court's decision in *Carbone,* we held that New Jersey's solid waste disposal laws, "in effect and by design," discriminated against interstate

commerce and therefore triggered heightened scrutiny under the dormant Commerce Clause. *Atlantic Coast I*, 48 F.3d at 710. We described New Jersey's flow control laws as follows:

> Like the governmental entities in the other cases involving local processing requirements, New Jersey is regulating a market which the Commerce Clause intended to be open to non-local competitors. More specifically, New Jersey is regulating the market for solid waste processing and disposal services in each of the districts by directing district consumers of those services to utilize a favored service provider who, in the absence of exceptional circumstances, operates a local facility. It necessarily follows, we conclude, that *any Commerce Clause analysis of New Jersey's flow control regulations must employ the heightened scrutiny test* and that the district court erred by subjecting them only to the balancing test of *Pike*.

Id., at 710-11 (emphasis added). Based on our conclusion that the State's solid waste program was discriminatory, we remanded the case to the district court to determine whether the statute nevertheless fell into that "narrow class of cases" in which the State could prove that it lacked viable means of satisfying a legitimate, non-discriminatory interest. *Id.*, at 717.

On remand, the defendants argued that a later opinion of this Circuit, *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir.1995), "clarified" our earlier decision in *Atlantic Coast I*. In *Harvey*, we held that the Supreme Court's decision in *Carbone* did not "establish a per se rule subjecting all flow control ordinances to strict

scrutiny." *Harvey*, 68 F.3d at 800. According to the County Authorities, the district court, in light of our decision in *Harvey*, should have severed the State's purpose of self-sufficiency from our consideration of the statute in *Atlantic Coast I* and should have then reviewed the flow control laws and the individual waste disposal plans of the twenty-two waste disposal districts separately to determine whether they were still discriminatory. The district court rejected the County Authorities' request. "The Third Circuit found the system to be discriminatory, and the Court will not revisit the holding." *Atlantic Coast II*, 931 F.Supp. at 346.

We affirm the district court's decision because our determination in *Atlantic Coast I* that New Jersey's flow control laws discriminated against interstate commerce was based not just on New Jersey's stated goal to create a self-sufficient in-state waste disposal program. It was also based on the management districts' selection of facilities and the codification of this selection by state regulation. As we noted in *Harvey*, a law that directs waste to a particular facility will not necessarily violate the dormant Commerce Clause as long as out-of-state operators are given an even chance to compete for the opportunity to dispose of the state or district's waste. *See* 68 F.3d at 802. In New Jersey, however, state policy had precluded such open competition and the list of facilities designated in N.J.A.C. § 7:26-6.5 reflects that policy. As a result of this discriminatory policy, the flow control regulations, through § 7:26-6.5, have limited the facilities that can accept waste generated in a particular district to those so designated in the regulation. Because the policy has affected the existing designations, it cannot be "severed"

from the rest of the statute for purposes of review under the Commerce Clause.

The fact that a district court in the *Waste Management* case has enjoined the State of New Jersey from acting on its policy of abrogating, rejecting or foreshortening contracts between management districts and out-of-state waste disposal facilities does not alter our determination that New Jersey's flow control statutes discriminate against out-of-state facilities. *See Waste Management*, No. 94-1983, amended order (D.N.J. October 29, 1996). First, the *Waste Management* injunction, as modified by the district court, applies only prospectively to future contracts between management districts and waste disposal facilities. It does not affect the current contractual agreements codified at N.J.A.C. § 7:26-6.5, which are the result of a discriminatory process. Second, the *Waste Management* injunction addresses only the state's approval or ratification of a waste management district's disposal plan, and not the district's initial choice of a facility. Our finding of discriminatory purpose and effect in *Atlantic Coast I*, however, applied *both* to the waste management district's choice of a facility to service its needs *and* to the State's approval of that choice.

In response to the argument of the County Authorities, Atlantic Coast urges that the defendants should not use this appeal to relitigate issues already resolved in prior rulings by this Court. We agree. The law of the case doctrine bars our reconsideration of issues previously resolved by an earlier panel. *See Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir.1994); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162 (3d Cir.1982). Since none of the traditional exceptions to the law of case doctrine apply

here (our previous decision was not clearly erroneous, no intervening "new law" has been decided other than the district court's injunction in *Waste Management*, and no new facts have surfaced), there is no reason to revisit the issue of whether the New Jersey waste disposal system is discriminatory. *See generally Bridge v. United States Parole Commission*, 981 F.2d 97, 102 (3d Cir.1992) (discussing general exceptions to law of case doctrine). A previous panel found discriminatory effect in *Atlantic Coast I*, 48 F.3d 701. We are bound by that determination. Nothing we said in *Harvey* changes our decision in *Atlantic Coast I* as it applies to the facts of this case. Accordingly, we affirm the district court's application of heightened scrutiny to New Jersey's flow control statutes.

B. Application of Heightened Scrutiny

Concluding that the district court correctly applied heightened scrutiny to New Jersey's waste disposal statutes, we now turn to the district court's finding that the flow control statutes were unconstitutional because the State of New Jersey did not uphold its burden under the heightened scrutiny test.[15] While we review the lower court's application of constitutional law de novo, we will reverse the district court's factual findings only if they

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[15] This test is described as "rigorous scrutiny," *see Carbone*, 511 U.S. at 392, 114 S.Ct. at 1683; "more demanding scrutiny," *see Maine*, 477 U.S. at 138, 106 S.Ct. at 2447; "strict scrutiny," *see Harvey*, 68 F.3d at 803; and "heightened scrutiny," *see Atlantic Coast I*, 48 F.3d at 713. Despite the various designations, the test is the same.

are clearly erroneous. *Fabulous Assoc., Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 783 (3d Cir.1990).

Once a district court finds that a state statute discriminates against interstate commerce, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local interest,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. at 139, 106 S.Ct. at 2447; *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1978). We now engage in the two-part inquiry set forth by *Maine* and *Hughes*.[16]

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[16] We emphasize that the heightened scrutiny test imposes a heavy burden on the state's discriminatory waste control regime. The State and County Authority defendants contend that even under heightened scrutiny the current waste-management system must be upheld unless the proposed alternatives would be equally effective in meeting the state's legitimate goals. According to their understanding of *Maine*, a challenged statue [sic] or regulatory measure will withstand the challenge as long as the State can show that a legitimate local purpose cannot "be served as well by available nondiscriminatory means."

We reject this reading of *Maine*. As we have noted, *see* II.A., *supra*, in *Carbone*, the Supreme Court explained that discrimination against interstate commerce "is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392, 114 S.Ct. at 1683, *citing Maine*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). To accept the State's interpretation of heightened scrutiny in *Maine* would be to lessen the standard of proof and to ignore that it is the State that must supply "the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.*

The district court found five legitimate justifications for New Jersey's solid waste disposal regulatory system:

> (i) assurance of long-term disposal capacity for all waste generated in New Jersey; (ii) support for development of environmentally safe capacity; (iii) promotion of recycling and source reduction; (iv) assistance in the prevention of illegal dumping and the control of illegal facilities; and (v) protection of the fiscal integrity of the governmental entities.

Atlantic Coast II, 931 F.Supp. at 346, ¶ 1. We agree that these five interests are legitimate objectives of the State. To justify a discriminatory statute, however, a state must do more than cite a legitimate interest; it must also show that it lacks alternative nondiscriminatory means of achieving that interest. Here, we agree with the district court that the defendants have failed to satisfy this second prong.

In *Atlantic Coast II*, the district court stated that "[d]efendants have not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests identified in ¶¶ 1 and 21, *supra*, as well or better than the current flow control regulations." *Atlantic Coast II*, 931 F.Supp. at 351, ¶ 25. The district court further observed:

> The above-market tipping fees that constitute the heart of New Jersey's flow control system are more or less a hidden tax paid by New Jersey residents. The tipping fees are used to cover not only the debt service of the bonds issued to fund facilities under flow control, but also to cover the fixed costs of operating waste disposal facilities, financing recycling programs

> and other environmentally friendly recovery projects, and developing long-term disposal plans. *Those activities could be financed through up-front taxes, user fees or other charges that do not discriminate against interstate commerce.* Even if there are significant costs to implementing the necessary revisions to the current flow control system, nothing in the record suggests that these would be exorbitant or beyond the capabilities of reasonable fundraising alternatives. And, in any case, the threat of some increase in costs cannot negate the constitutional mandate of the dormant Commerce Clause.

Id., at 353-54 (emphasis added). We affirm the district court's interpretation of the dormant Commerce Clause and its application of the Clause to the facts.

The County Authorities and the State argue, however, that the flow control laws are indispensable. First, they claim that these laws are necessary to prevent illegal dumping and other environmentally unsound practices. Second, they contend that these laws are necessary to underwrite the cost of paying off the debt on the locally constructed waste disposal facilities. In regard to the first of these contentions, neither the County Authorities nor the State has cited record evidence to show that alternative measures are unable to prevent illegal or unsafe dumping of waste.[17] Accordingly, we will consider their

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[17] Our disposition of this case does not for example affect Section 48:13A-9(b) of the SWUCA, which enables the State to suspend a corporation's certificate to collect waste in New Jersey if its violates "any provision of any laws related to pollution of the air, water or lands" of the State. *See* N.J.S.A. § 48:13A-9(b).

argument only as it pertains to the financial effect of giving up the current flow control system.

The County Authority defendants and State defendants each attack the district court's decision on slightly different grounds. The County Authorities argue that "Plaintiffs/Appellants have offered no evidence that there was any alternative, as of 1970, that *could have* achieved the lawful public purposes 'as well' with less discrimination against interstate commerce." *County Authorities Br.*, at 11 (emphasis added). This argument lacks merit for several reasons. First, it locates the burden of proof with the wrong party. The Supreme Court has stated quite clearly that once a statute triggers heightened scrutiny, the party *defending* the statute bears the burden of proof. *See Maine*, 477 U.S. at 138, 106 S.Ct. at 2447. Second, the County Authorities focus too much attention on the phrase "as well" when defining the content of the heightened scrutiny test. The heightened scrutiny test, however, concerns itself with questions of viability, not questions of convenience. *See Carbone I*, 511 U.S. at 392, 114 S.Ct. at 1683. Finally, the County Authorities' argument fails because it measures the viability of the nondiscriminatory alternatives in terms of past and not present events. The Supreme Court has held that environmental and economic arguments must be rejected "absent the clearest showing that the unobstructed flow of interstate commerce itself *is* unable to solve the local problem." *Id.* (emphasis added). The operative word in this sentence is the verb "is". The question is not what *was* the best system for New Jersey when the statutes were adopted, but rather whether any non-discriminatory system could *now serve* New Jersey's legitimate goals of

solid waste disposal in an efficient and environmentally safe manner. Because the County Authorities have failed to address this question with evidence relating to the present time, they have not fulfilled their burden under the dormant Commerce Clause.

Like the County Authorities, the State of New Jersey has also failed to demonstrate why the district court's factual determination that nondiscriminatory alternatives were at least feasible was clearly erroneous. The gravamen of the State's defense is that the elimination of flow control laws will force local waste disposal authorities to compete with out-of-state firms. Competition, in turn, will preclude local facilities from charging inflated tipping fees. Consequently, local facilities constructed with bond money will attract lower volumes of waste and will lose operating revenue, reducing their ability to pay off their debt to the bondholders. Debt issues will risk default, and local waste disposal facilities will incur operating deficits. Finally, default on the solid waste disposal facilities will affect the health of debt instruments issued by other government entities in New Jersey. *Atlantic Coast II*, 931 F.Supp. at 350, ¶ 20. The State defendants descriptively dub this scenario as the "death spiral."

Although we concede that the consequences of defaulting on the local waste facilities' substantial loans cannot be minimized or ignored, we disagree with the State's presumption that its problems are insurmountable. The district court listed several alternatives by which the State could lift its flow control laws yet ensure the financial integrity of the local government entities. In particular, the court suggested that the State: (1) issue new bonds to refinance its in-state solid waste disposal

facilities, (2) implement "user charges" for those who use the facilities or a "system benefit charge" to make up for lost funds, (3) issue a statewide solid waste tax (or assessment) on all waste generated in state regardless of where it was sent (in or out of state) for disposal, (4) have the municipalities establish long term contracts with solid waste facilities (assuming, of course, that out-of-state facilities could compete with in-state facilities on an equal footing), or (5) fund the system through a combination of municipal, county, or State "general revenues" (i.e. taxes). *Atlantic Coast II*, 931 F.Supp. at 351, ¶ 23.

According to the district court, the State defendants did not shoulder their burden of demonstrating that none of the suggested alternatives could satisfactorily finance – either individually or through some combination – their waste disposal needs. Rather, the defendants "merely caricatured each of the tools that may be used in building a new system." *Id.* at 351, ¶ 25. The district court elaborated:

> In its submissions to the Court, the State does not attempt to develop a comprehensive, cohesive plan using the wide variety of political and financial tools available to it. Rather, the defendants have looked at a series of one-dimensional alternatives in isolation and only attempted to prove that no one technique (e.g., system benefit charges, user fees, new taxes, refunding bonds, county or state assumption of debt) can possibly do the job. These isolated distortions do not constitute a fair and adequate attempt at evaluating available alternatives.

Atlantic Coast II, 931 F.Supp. at 354. Based on the evidence in the record, we conclude that the district court did not

commit clear error when it determined that viable alternatives to the flow control laws could accomplish the defendants' legitimate objectives. Moreover, on appeal, the State has also failed to demonstrate why the current flow control regulations are the only viable means of ensuring the financial integrity of its waste management districts.[18]

We sympathize with the State defendants to the extent that local and state officials understandably presumed New Jersey's flow control laws to be constitutional when they issued bonds to build the local waste disposal facilities. See *Filiberto*, 857 F.2d at 923. Nevertheless, sympathy cannot cloud reason. It is clear to this Court that a key benefit of discriminatory flow control laws is that they ensure higher levels of revenue for local facilities by excluding foreign competition. The Supreme Court has held, however, that "[b]y itself . . . revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone I*, 511 U.S. at 393, 114 S.Ct. at 1684. We cannot permit the State of New Jersey to discriminate in order to raise money to service waste management debt merely because the funds are necessary to finance that debt. In reviewing the State's need to raise money to finance the local authorities' debt obligations, the district court properly did not limit its consideration to waste management district fees as the sole possible source of those funds. The State has not

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[18] Since the viability of other waste disposal schemes is a factual matter, the district court's conclusion is reversible only if this Court finds clear error. *See Fabulous Associates*, 896 F.2d at 783.

proven – to the district court or to this Court – why none of the five alternate methods of financing described by the district court are able to service the local authorities' debt.

With regard to the district court's suggestion that the State issue new "refunding" bonds to refinance the disposal facilities' debt, the State contends that, depending on the interest rate of the new bonds, it might incur huge losses. This may be true, but the State's financial losses alone cannot justify discrimination against interstate commerce. The Supreme Court has long held that the expense of dismantling a discriminatory system does not justify a state's continued enforcement of that system. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 51, 110 S.Ct. 2238, 2257 n. 35, 110 L.Ed.2d 17 (1990) (tax refund remedy for statute struck down as violative of dormant Commerce Clause could not be denied on grounds of cost to State). Cf. *Watson v. City of Memphis*, 373 U.S. 526, 537, 83 S.Ct. 1314, 1321, 10 L.Ed.2d 529 (1963) (vindication of equal protection rights "cannot be made dependent on any theory that it is less expensive to deny than to afford them").

The State further argues that a bond refinancing "would likely have a significant and detrimental impact on the State's bond rating and thus, the State's ability to raise capital for other public works." Without addressing the accuracy of this forecast, we merely point out that a bond refund would impact only *one method* of raising capital. It would not affect the State's ability to finance public works through taxes or other sources of revenue.

The district court also suggested that the State implement "user charges" or a "systems benefit charge" to make up for the local waste disposal facilities' lost revenue in the event that the flow control laws are declared unconstitutional. The State responds that this alternative is not viable because (1) it may be unauthorized under current state statutes as a source of revenue, and (2) such an alternative can work only "when a jurisdiction is writing on a clean slate". We disagree. First, the legality of the proposed alternative under *state* law is irrelevant to a court's heightened scrutiny inquiry because the legislature can re-write its statutes if it has the desire or the need to do so. Second, the fact that the waste facility bonds are already outstanding does not explain why their debt could not be serviced with revenues from supplemental user charges as opposed to revenues from a captured waste-disposal market.

With regard to the suggestion for a special tax on all waste generated within the State, regardless of its final destination, the State suggests that this tax itself might be held unconstitutional. Because this issue is not before us, we will not determine the constitutionality of a special tax on solid waste. Even if we should assume, however, that this alternative is not viable, there are still other avenues open to the State. General tax revenues, raised either by the State or by the individual counties, can service the debt of the local facilities. In short, various options are open to State and local officials if they desire to use them.

We add that this is not the first time a local or state law has been struck down under the Commerce Clause to the financial detriment of a local entity that depended on

a prior regime.[19] In *Carbone*, the Supreme Court struck down Clarkstown's flow control ordinance, despite the town's worry that the local waste disposal facility might lack long-term survival. The Court opined that "having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." 511 U.S. at 394, 114 S.Ct. at 1684. The State of New Jersey argues nevertheless that the principles expounded by the Supreme Court in *Carbone* are inapplicable because substantially greater financial concerns arise with the elimination of a state-wide flow control system than with a county or district-wide system. We cannot accept this argument since it would insulate large regulatory systems from the dictates of the Commerce Clause, despite the fact that they cast a wide net and hoard a valuable resource, *e.g.*, an entire state's solid waste. It makes little sense to permit the perpetuation of wide-spread discrimination simply because the cost of dismantling the discriminatory system is greater on a state-wide level than it is on a district or county level.

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[19] We must note that the defendants' reliance argument is rather weak, in light of the Supreme Court's opinion in *Carbone I*, which was issued nearly three years ago in 1994. The district court noted that bond rating agencies have downgraded the ratings of outstanding issues of several local authorities "due to the uncertainty of the fiscal integrity of those authorities as a result of the issuance of the *Carbone I* decision on May 16, 1994 and the *Atlantic Coast [I]* decision in February of 1995." *Atlantic Coast II*, 931 F.Supp. at 348-49. Thus, the defendants clearly had some warning that we might reverse the stance we had taken in *Filiberto*.

Based on the preceding analysis, we hold that the State of New Jersey cannot protect the local waste disposal market, and thereby exclude out-of-state competitors, in order to use inflated revenues to finance the substantial debts of its waste management districts. Alternatives to the current regime of flow control laws are available to the State and to the County Authorities. We therefore affirm the district court's conclusion that New Jersey's present flow control system is unconstitutional under the dormant Commerce Clause.

C. *The Scope of The Injunction*

After it had determined that New Jersey's regulations of flow control violated the commerce clause, the district court enjoined their enforcement:

> An INJUNCTION is hereby entered . . . against enforcement of the New Jersey waste flow regulations to the extent these regulations discriminate against interstate commerce. . . .

Atlantic Coast II, 931 F.Supp. at 359. Due to the fact that New Jersey's waste disposal statutes cover a number of subjects unrelated to flow control, the above language of the district court's injunction is not clear as to which parts of SWUCA or SWMA are to be enjoined. Consequently, we shall clarify the injunction based on the representations of the parties at oral argument, as well as our understanding of the plaintiffs' petition, which seeks "a declaratory judgment that the solid waste plans identified in N.J.A.C. § 7:26-6:5 violate the Commerce Clause of the United States Constitution and an injunction against enforcement of these regulations[,]" 931 F.Supp. at 343. In

doing so, we eliminate the necessity for further proceedings in the district court regarding this important issue and direct the clerk of this court to enter the injunction as set forth at the end of this opinion. *See Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir.1977) (en banc) (modifying district court's interdistrict injunctive remedy in desegregation of public school system).

N.J.A.C. § 7:26-6.5 codifies the designated facilities for waste disposal within each of New Jersey's twenty-two waste management districts.[20] As we have discussed in Part II.B., this regulation is unconstitutional because it has discriminated against out-of-state waste disposal facilities in the process through which facilities were designated to dispose of each district's waste.

In view of the specificity of the plaintiffs' request in their complaint, as well as our understanding of the dormant Commerce Clause, we limit the scope of the district court's injunction to the pertinent provisions of N.J.A.C. § 7:26-6.5. Pursuant to the effect of the injunction, the disposal facilities presently listed there can no longer be considered the facilities to which each district's solid waste must be directed. The waste management districts must modify their plans to select new disposal facilities pursuant to N.J.A.C. §§ 7:26-6.6 and 6.7. It goes without saying that the waste management districts must

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[20] *See* Appendix, *infra*. Of course, the injunction does not apply to those limited portions of N.J.A.C. § 7:26-6.5 that permit the disposal of particular types of waste with out-of-state facilities. *See e.g.* N.J.A.C. § 7:26-6.5(b)(1)(i); N.J.A.C. § 7:26-6.5(d)(2)(i); N.J.A.C. § 7:26-6.5(u)(6).

not discriminate against out-of-state facilities when they modify their plans.

Moreover, insofar as New Jersey's self-sufficiency policy has precluded the designation of out-of-state waste disposal facilities, this injunction mirrors the injunction issued in Waste Management in that NJDEP can no longer implement its self-sufficiency policy – either formally or informally – by rejecting or hindering contracts between waste management districts and out-of-state facilities or operators.

The injunction does not bar the enforcement of the State's remaining portions of either SWUCA or SWMA. The surviving portions of these statutes are not included within the scope of plaintiffs' petition and, in addition, they do not, in and of themselves, discriminate against interstate commerce. For example, out-of-state facilities wishing to proceed in the collection of solid waste will have to obtain a certificate of public convenience from the Board of Public Utilities and register with NJDEP prior to commencing service. N.J.S.A. § 48:13A-6. The certificate allows the State to regulate the rates charged by the individual seeking certification. *See* N.J.S.A. §§ 48:13A-4, 7.5, 7.13, 7.15, 7.20. Out-of-state facilities also will remain subject to New Jersey's environmental laws and regulations, as well as to its record keeping requirements and transportation regulations. *See* N.J.S.A. § 48:13A-9(b) (enabling State to suspend corporation's certificate to collect waste if it violates "any provision of any laws related to pollution of the air, water or lands" of the state); N.J.S.A. § 48:13A-7.16 & 7.17 (enabling Board of Public Utilities to compel "any person engaged in the business of solid waste collection" to provide annual

report, business records or documents related to collection services).

The State has also alluded to potential traffic disruption that may result from imposition of an injunction. However, the injunction concerns only the ultimate destination of the trash, as opposed to the manner in which it is collected. Moreover, local authorities will be able to retain the discretion to regulate the traffic routes used by in-state and out-of-state trash collectors alike.[21]

In citing the above regulatory provisions that will remain in effect despite the enjoining of N.J.A.C. § 7:26-6.5, we do not present an all-inclusive list. We do not need to do so because, if the process for selecting waste disposal facilities no longer discriminates against interstate commerce, neither will the regulatory provisions enforcing such a nondiscriminatory system. Although the State of New Jersey may no longer preclude the designation of out-of-state waste disposal facilities or operators, the State and the County Authorities remain free to regulate the flow of waste within New Jersey so long as the State's laws and regulations treat in-state and out-of-state facilities equally. *See Harvey*, 68 F.3d at 801-02.

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[21] No regulations currently govern the traffic routes for trash disposal in New Jersey. Although the SWMA requires the county authorities to provide a survey of transportation routes pursuant to N.J.S.A. § 13:1E-21(b)(4), the county authorities ultimately retain the discretion to prescribe particular routes for transportation.

III. THE STAY

After it had found the flow control laws in New Jersey to be unconstitutional, the district court took the extraordinary step of issuing, *sua sponte*, a two-year stay of the Carbone plaintiffs' permanent injunction. The stay is to go into effect upon the exhaustion of all appeals or petitions for certiorari to the Supreme Court. In justifying the stay, the district court reasoned:

> The Court recognizes the enormity of the task which *Carbone I* and the Third Circuit opinion in *Atlantic Coast* have imposed on New Jersey citizens. To scrap immediately a detailed regulatory plan implemented over the course of decades and relied upon by investors, business people, and political figures would wreak havoc on the financial and environmental well-being of New Jersey citizens. The Court must permit the relevant governmental bodies to develop the specific nondiscriminatory alternative which they wish to employ, and this development cannot be done overnight.

Atlantic Coast II, 931 F.Supp. at 358.

As a consequence of the stay, Carbone and similarly situated waste disposal firms may not collect or dispose of trash until two years after the last appeal or petition for certiorari has been denied. The Carbone plaintiffs appeal the imposition of the stay as unconstitutional. The State and the County Authorities defend the stay as a permissible exercise of equitable discretion. Our review of the legal issues involved in the issuance of the stay, including its constitutionality, is plenary. The fashioning of the remedy is reviewed for abuse of discretion, and the

district court's findings of fact are reviewed for clear error. *See Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 61 (3d Cir.1991).

We agree with the plaintiffs. Whatever the district court's power may be to delay constitutional relief, none of the justifications raised by the defendants support the extraordinary act of delaying the injunction of an unconstitutional law.[22] Consequently, we will vacate the district court's stay insofar as it will extend past the exhaustion of appeal or petition for certiorari in this case.[23]

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[22] The district court issued its two-year post-appeal stay without developing a record. This alone compels us to vacate the stay as an abuse of discretion. We will not, however, remand on this issue because as we demonstrate *infra*, the defendants simply cannot prove any harm other than adverse financial impact, which by itself, cannot support the district court's extraordinary action.

[23] Neither the plaintiffs nor this Court question the district court's authority to issue a stay pending the defendant's appeal of this case. Although a stay-pending-appeal effectively prevents a prevailing party from exercising protected activity, it is substantively different from a post-appeal stay.

The purpose of a stay-pending-appeal is to relieve the losing party of the burden of changing his behavior unnecessarily. When a lower court issues a stay pending appeal, it recognizes the possibility that its ruling on the merits may be incorrect. If indeed the lower court's determination is incorrect, it may force a losing party to expend substantial and unrecoverable amounts of money for no reason at all. Consistent with this purpose, one of the factors courts consider when they grant stays pending appellate review is whether the applicant for such relief has shown that he is likely to succeed on the merits. *See Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). Thus, a stay-pending-appeal has nothing to do with the losing party's reliance on "old" law; on

Before arriving at this conclusion we have carefully considered the contentions of the defendants. They provide three justifications for the district court's stay. First, the defendants attempt to analogize this case to school desegregation[24] and prison reform[25] cases by arguing that they need time to create a new waste disposal system that does not violate the Commerce Clause. Second, the defendants maintain that a stay is necessary to combat the environmental effects of allowing out-of-state entities access to New Jersey's waste disposal market. Finally, the defendants contend that the financial cost of an immediate injunction is so great that it justifies the district court's post-appeal stay.

We reject the defendants' arguments as lacking merit. First, the defendants maintain that the district court's injunction forces them to create an entirely new waste disposal system, and that the two-year stay is necessary to enable them to solve the administrative difficulties of constructing such a system. We disagree. As we stated in Part II. C., *supra*, the district court's injunction extends no further than N.J.A.C. § 7:26-6.5. Our decision today leaves the bulk of New Jersey's waste disposal system in place, except that the twenty-two waste management districts must modify their waste disposal plans and choose

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the contrary, it is issued on the assumption that the "new" law is not yet law at all.

[24] *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

[25] *See, e.g., Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

new facilities to service their needs in a non-discriminatory fashion. The twenty-two management districts already have the power to modify their disposal plans under N.J.A.C. § 7:26-6.6. Moreover, NJDEP may issue temporary emergency orders to redirect the flow of waste pursuant to N.J.A.C. § 7:26-6.7(a).[26] Thus, the defendants have all the tools necessary to bring their waste disposal system within the ambit of the Commerce Clause. A two-year post-appeal stay, which would subject the Carbone plaintiffs and similarly situated out-of-state facilities to an unconstitutional regulation, is therefore not justified by the defendants' so-called "administrative" concerns.

The defendants also claim that they need a two-year stay in order to deal with the grave environmental threats posed by the district court's injunction. According to the defendants, an immediate injunction might result in chaos or a disruption of waste disposal and collection within the state, thereby creating a multitude of environmental and health-related problems.

The defendants' fears are unfounded. The district court's injunction does not threaten the environmental well-being of the citizens of New Jersey in any manner whatsoever. All it does is force the waste management districts to choose new waste disposal facilities on a non-discriminatory basis. The Commerce Clause itself teaches us that we cannot assume that out-of-state facilities will

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[26] This provision states in pertinent part:

"Upon a determination by the Department that an emergency condition . . . requires the redirection of waste flows, the Department may order such redirection." N.J.A.C. § 7:26-6.7(a).

dispose of or collect waste in any less an environmentally responsible manner than facilities located within the State. Furthermore, the district court's injunction does not affect those provisions of the SWUCA or SWMA that regulate the granting of certificates of convenience or the suspension of those certificates for violations of New Jersey's air, water or land pollution laws. Thus, just as the defendants' environmental arguments are insufficient to support their Commerce Clause argument, so too are they insufficient to support their argument for the district court's stay.

In reality, the relief that the defendants seek is relief from the financial threat to local waste disposal facilities if those facilities are unable to charge artificially high tipping fees. This economic impact is real but it cannot justify the district court's imposition of a post-appeal stay. As we demonstrate below, the Supreme Court has established that, whatever the economic costs of remedying a constitutional violation, the mere expense of the remedy cannot justify the withholding of the plaintiffs' requested relief.

The financial expense arguments offered by the State and the County Authorities in support of the district court's stay mirror the defendants' arguments in favor of finding flow control constitutional under the Commerce Clause. By enjoining the enforcement of New Jersey's flow control laws, the defendants urge, we shall cause the local waste disposal facilities to lose a large portion of the tipping fees on which they depend to service their debt. Just as we rejected this argument in our Commerce Clause analysis, we must also reject it in our discussion of the district court's stay.

Our Constitution ordinarily demands "prompt rectification" of constitutional violations, absent an "overwhelmingly compelling reason". *Watson*, 373 U.S. at 533, 83 S.Ct. at 1318 (1963). The Supreme Court's decision in *Watson* itself demonstrates that the defendants' financial problems could not constitute the "compelling reason" for delaying a remedy. *Watson* involved the desegregation of public parks. Rejecting the defendants' argument that desegregated parks would require additional supervision and thereby cost too much money, the Supreme Court declared, "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Id.*, 373 U.S. at 537, 83 S.Ct. at 1321.

A generation later, the Supreme Court echoed this theme in *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). *McKesson* concerned the issue of what constituted adequate relief for the wrongful payment of a state tax that had been held unconstitutional because it violated the dormant Commerce Clause. Unlike the district court's stay of the injunction in this case, the Florida Supreme Court in the *McKesson* case had at least enjoined the future enforcement of the unconstitutional state tax. The state court had nevertheless denied the petitioners any refund for taxes already paid. The Supreme Court held that this denial of a refund was unconstitutional because it failed to alter Florida's discrimination against the petitioners, who had paid the higher tax.[27] "If a State places a

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[27] The state of Florida could also have remedied the situation by charging local liquor producers at the higher rates

taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31, 110 S.Ct. at 2247. Although we do not decide the present case on Due Process grounds, we nevertheless conclude that *McKesson* bars the defendants from arguing that the financial cost of a constitutional remedy constitutes a justification for withholding that remedy.

The Supreme Court in *McKesson* explicitly rejected Florida's "equitable considerations," including the argument that the cost of the tax refund justified the court's withholding of such relief. In response to this argument, the Supreme Court stated:

> We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to another wise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds.

Id. at 51, 110 S.Ct. at 2257. The Supreme Court's reasoning in *McKesson* applies equally to the defendants' argument in this case. The enjoining of flow control in New Jersey

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that it had already charged out-of-state firms. *See McKesson*, 496 U.S. at 39-40, 110 S.Ct. at 2252.

will divert local revenue from local waste disposal facilities. The local authorities need revenue to service the disposal facilities' debt. This need does not, however, justify the State and the County Authorities' perpetuation of an unconstitutional law at the expense of out-of-state waste disposal facilities, which have been denied access to New Jersey's waste disposal market. Just as "revenue generation is not a local interest that can justify discrimination against interstate commerce [,]" revenue generation in and of itself cannot justify court ordered perpetuation of an unconstitutional law. *Carbone*, 511 U.S. at 393, 114 S.Ct. at 1684. The cost of lifting flow control in New Jersey cannot support the district court's "discretion" to impose a two-year stay.[28]

In arguing that the financial cost of the injunction justifies the stay, the State also relies on the equitable principles set out in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).[29] According to the State,

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[28] We do not find dispositive the fact that the Florida Supreme Court in *McKesson* withheld relief, while the district court in this case simply delayed its relief for two years. Either way, the plaintiffs are forced to suffer the results that accrue from the enforcement of a law that concededly violates the Commerce Clause. Nor have we found any case, involving solely the financial impact of rectifying a constitutional violation, where a delay in remedy is permitted on that ground alone.

[29] *Chevron Oil* listed three factors for a court's consideration: first, whether the decision to be applied established a "new principle of law"; second, whether application of the new rule retroactively would "further or retard its application"; and third, whether the decision would create "inequitable results" if applied retroactively to the

cases such as *Chevron Oil* support the district court's stay, since the construction of the local waste disposal facilities in New Jersey preceded the Supreme Court's decision striking down discriminatory flow control laws as unconstitutional in *Carbone*. However, the Supreme Court's latest retroactivity jurisprudence has overruled *Chevron Oil*'s equitable balancing test as the determinant of whether a new principle of law will be applied retroactively. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, ___, 115 S.Ct. 1745, 1748, 131 L.Ed.2d 820 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517-18, 125 L.Ed.2d 74 (1993).

After *Hyde* and *Harper*, it is unclear as to what extent a court may, after "applying" a new principle of law retroactively, separately consider equitable factors in shaping an appropriate remedy for a constitutional violation. *See Hyde*, 514 U.S. at ___, 115 S.Ct. at 1749 ("[T]he ordinary application of a new rule of law 'backwards,' say, to pending cases, may or *may not*, involve a further matter of remedies. Whether it does so, and, if so, what kind of remedy [a] court may fashion depends – like almost all legal issues – upon the kind of case, matter, and circumstances involved.") (discussing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 2443, 115 L.Ed.2d 481 (1991)). Moreover, if a court may still engage in a separate remedial inquiry, it is unclear what factors may be considered, and whether these

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parties before the court. *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. at 355.

include a defendant's reliance interests.[30] We need not decide any of these retroactivity questions in this case.[31] Even if we consider all of the State's justifications for a stay, we must conclude that they are insufficient to establish that a two-year post-appeal stay is an appropriate remedy for the constitutional violation involved here.

Our analysis of the record before us and of Supreme Court precedent leads us to conclude that the district court's post-appeal stay cannot stand. Plaintiffs' remedy cannot be denied or delayed based on the financial cost of enjoining the state's flow control laws. Because the impact of the injunction is solely economic, this case does not fall within the constitutional boundaries of district court's equitable discretion. We will, therefore, vacate the district court's post-appeal stay.

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[30] Judge Roth would point out that *Hyde* itself suggests that reliance interests, by themselves, may not support a court's withholding of remedial relief. "If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial [of relief] because it is characterized as a denial based on 'remedy' rather than 'non-retroactivity'?" *Hyde*, 514 U.S. at ___, 115 S.Ct. at 1749 (criticizing argument that reliance interests may support withholding of remedial relief).

[31] We do note, however, that the Supreme Court's latest retroactivity decisions remain relevant to our analysis of the district court's stay insofar as they demonstrate that financial expense, by itself, cannot serve as a reason for denying constitutional relief.

IV. CONCLUSION

Under our holding, New Jersey lawmakers must now open up their waste disposal system so that out-of-state facilities and operators can compete for designation by the waste management districts. We cannot allow the State to deny or delay its obligation to open up the system because of the economic impact of our decision. The district court's stay will be reversed. Because of the weighty issues raised by this case and the agreement of all parties at oral argument to a stay pending appeal, we will, however, stay the injunction pending the exhaustion of the defendants' petition for certiorari to the Supreme Court. Upon denial of that petition, or the Court's rendering of a final decision in this case affirming this court's conclusions of law, the injunction sought by the plaintiffs will go into effect, immediately.

The district court's conclusion that New Jersey's flow control regulations are unconstitutional under the dormant Commerce Clause is AFFIRMED. The State is ENJOINED from enforcing N.J.A.C. § 7:26-6.5 as it is presently constituted.[32] The district court's two-year

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[32] The clerk is directed to enter our order and injunction as follows:

IT IS HEREBY ORDERED AND DECREED:

1. Final judgment is hereby entered in favor of plaintiffs and against defendants, declaring that New Jersey's waste flow control regulations are unconstitutional insofar as they discriminate against out-of-state operators of waste-disposal facilities.

2. The defendants, their agents, servants, employees, designees, and assigns, are enjoined from enforcing those provisions of New Jersey

post-appeal stay is REVERSED. The injunction will be stayed, however, and become effective only upon the exhaustion or passage of time for all appeals or upon the denial of petitions for certiorari by the Supreme Court of

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Administrative Code § 7:26-6.5 which, by designating in-state facilities as the sole providers of disposal and processing services, discriminate against out-of-state operators of waste-disposal facilities. This injunction shall not apply to those limited portions of N.J.A.C. § 7:26-6.5 that permit the disposal of particular types of waste with out-of-state facilities. *See, e.g.*, N.J.A.C. §§ 7:26-6.5(b)(1)(i), 6.5(d)(2)(i), 6.5(u)(6).

3. Insofar as the defendants must select and contract with waste disposal facilities pursuant to N.J.A.C. §§ 7:26-6.6 and 6.7 in order to comply with the provisions of this injunction, they are permanently enjoined from implementing New Jersey's self-sufficiency policy as mandated under the State Plan by abrogating existing valid contracts or rejecting or foreshortening contracts submitted to the New Jersey Department of Environmental Protection for review.

4. This injunction does not bar the enforcement of the remaining portions of either the Solid Waste Utility Control Act, N.J.S.A. §§ 48:13A-1 *et seq.*, or the Solid Waste Management Act, N.J.S.A. §§ 13:1E-1 *et seq.*

5. The district court's two-year post-appeal stay is reversed.

6. This injunction will be stayed, and become effective only, upon the exhaustion or passage of time for all appeals, or denial of petitions for certiorari by the Supreme Court of the United States, or by the United States Supreme Court's final decision in this case affirming this court's judgment.

7. As so modified, the judgment of the district court will be affirmed.

the United States or upon the United States Supreme Court's final decision in this case affirming this court's judgment.

APPENDIX

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NEW JERSEY ADMINISTRATIVE CODE TITLE 7. DEPARTMENT OF ENVIRONMENTAL PROTECTION CHAPTER 26. SOLID WASTE SUBCHAPTER 6. INTERDISTRICT AND INTRADISTRICT SOLID WASTE FLOW

Current through April 7, 1997; 29 N.J. Reg. No. 7

7:26-6.5 District waste flow planning requirements and disposal facility designations

(a) Waste flows within, into and out of the Atlantic County District:

1. All solid waste types 10, 23, and 25 generated from within all Atlantic County municipalities shall be directed to the Atlantic County Transfer Station, facility number 0108M, located in Egg Harbor Township, Atlantic County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective August 8, 1990).

i. Up to 12 tons per day of waste types 10 and 27 generated at the Atlantic County Community College and the Atlantic County Vocational Technical School, and from other commercial, industrial, and governmental generators as may later be determined by agreement between Atlantic County and relevant generators and haulers, shall be disposed of at the Atlantic County

Resource Recovery Facility, facility number 0112C, located in Hamilton Township, Atlantic County, New Jersey.

2. All solid waste types 13 and 27 generated from within all Atlantic County municipalities shall be directed to the Atlantic County Landfill, facility number 0108N, located in Egg Harbor Township, Atlantic County, New Jersey.

(b) Waste flows within, into and out of the Bergen County District:

1. Two hundred and fifty thousand (250,000) tons per year of processible solid waste types 10 and 23 generated from within Bergen county and processed at the SalCar Transfer Station, facility number 02267b, located in Hillsdale Boro, Bergen County, the DiBella Transfer Station, facility number 0247B, located in Park Ridge Boro, Bergen County, the National Transfer Station, facility number 0231A, located in Lodi Boro, Bergen County, the Garofalo Transfer Station, facility number 0221A, located in Garfield City, Bergen County, and the United Carting Transfer Station, facility number 0218A, located in Fairview Boro, Bergen County, shall be transported directly to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey. (Effective May 1, 1991).

i. All residual ash generated from the operation of the Essex County RRF shall be disposed of by the Bergen County Utilities Authority (BCUA) consistent with the agreement between the BCUA and Essex County and in compliance with the Essex County RRF facility permit at

permitted and approved out-of-State landfill facilities. (Effective May 1, 1991).

ii. Bypass waste and nonprocessible waste generated from the operation of the Essex County RRF shall be disposed of consistent with the agreement between the BCUA and Essex County and in accordance with the provisions of the approved Essex County District Solid Waste Management Plan. (Effective May 1, 1991).

2. At the request of Essex County, processible solid waste types 10 and 23 generated within Bergen County in an amount not to exceed 1,600 tons per week in 1992, 2,000 tons per week from January 4, 1993 through February 28, 1993, and 1,700 tons per week from March 1, 1993 through July 31, 1993 shall be transported to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, New Jersey, on an as needed basis from one of the transfer stations set forth in (b)1 above or (b)4 below.

3. Except as may be required by the terms of (b)2 above, to the extent that the five private transfer stations set forth in (b)1 above process tonnages in excess of the 250,000 tons noted above, all excess processible solid waste types 10, 13, 23, 25 and 27 shall be directed from each individual transfer station to an approved out-of-State disposal facility as provided in the Bergen County Plan. (Effective May 19, 1992).

4. All remaining solid waste types 10, 13, 23, 25 and 27 generated within Bergen County and not processed by the five transfer stations identified in (b)1 above shall continue to be directed to the Bergen County Utilities Authority Transfer Station, facility number 0232C, located

in North Arlington, Bergen County, prior to transportation to an approved out-of-State disposal facility as provided in the Bergen County Plan. (Effective May 1, 1991).

5. All solid waste type 10 generated from within North Arlington shall be disposed of at the HMDC 1-E Landfill [sic], facility number 0239D, located in North Arlington, Bergen County. Upon closure of the HMDC 1-E Landfill, all solid waste type 10 generated from within North Arlington shall be redirected to the Bergen County Utilities Authority Transfer Station, facility number 0232C, located in North Arlington, Bergen County, prior to transportation to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

(c) Waste flows within, into and out of the Burlington County District:

1. All solid waste types 10, 13, 23, 25 and 27 generated from within all Burlington County municipalities, with the exception of (c)1i noted below, shall be disposed of at the Burlington County Landfill, facility number 0318A, located in Florence and Mansfield Townships, Burlington County, New Jersey.

i. All waste types 10, 23, and 27 generated at the Fort Dix Army Base and the McGuire Air Force Base, located within New Hanover and North Hanover Townships, shall be disposed of at the Fort Dix Heat Recovery Incinerator, facility number 0325A, located in New Hanover Township, Burlington County. All nonprocessible and nonhazardous residual waste shall be disposed of at the Burlington County Landfill.

(d) Waste flows within, into and out of the Camden County District:

1. All residential waste types 10, 13, 23, 25 and 27 generated in Chesilhurst Borough, Waterford Township and Winslow Township shall be directed to the Winslow Township Transfer Station, facility number 0436I, located in Winslow Township, Camden County, New Jersey. Once transferred, the waste from the Winslow Township Transfer Station shall be disposed of at the South Camden Resource Recovery Facility, Facility Number 0408C, except for waste type 25 which shall continue to be directed from the transfer station to out-of-State disposal in accordance with the laws and regulations of the receiving state.

i. All commercial waste types 10, 13, 23, and industrial waste type 27 generated in Chesilhurst Borough, Waterford Township and Winslow Township shall be disposed of directly at the South Camden Resource Recovery Facility, Facility Number 0408C, except that waste type 25 shall continue to be disposed of directly out-of-State in accordance with the laws and regulations of the receiving state.

2. All waste types 23 and 27 and nonprocessible 13 generated from within the Camden County municipalities of Audubon Borough, Cherry Hill Township, Haddonfield Borough, Haddon Township, Lindenwold Borough, Merchantville Borough, Pennsauken Township, Tavistock Borough, and Voorhees Township shall be disposed of at the Pennsauken Township Sanitary Landfill, facility numbers 0427D1SE01, 0427D1SE03, and 0427A-E1,

located in Pennsauken Township, Camden County, New Jersey.

i. All waste type 25 generated from within the Camden County municipalities of Audubon, Cherry Hill, Haddonfield, Haddon Township, Lindenwold, Merchantville, Pennsauken, Tavistock and Voorhees shall be disposed of out-of-State [sic] in an approved facility in accordance with the laws and regulations of the receiving state.

ii. All waste types 10 and processible 13 generated from within the Camden County municipalities of Audubon, Cherry Hill, Haddonfield, Haddon Township, Lindenwold, Merchantville, Pennsauken, Tavistock, and Voorhees shall be disposed of at the South Camden Resource Recovery Facility, facility number 0408C, located in Camden City, Camden County. (Effective January 13, 1992).

3. All solid waste types 10, 13, 23, and 27 generated within the Camden County municipalities of Audubon Park, Barrington, Bellmawr, Berlin Borough, Berlin Township, Brooklawn, Camden City, Chesilhurst, Clementon, Collingswood, Gibbsboro, Gloucester City, Gloucester Township, Haddon Heights, HiNella, Laurel Springs, Lawnside, Magnolia, Mt. Ephraim, Oaklyn, Pine Hill, Pine Valley, Runnemede, Somerdale, Stratford, Waterford, Winslow and Woodlynne shall be directed to the South Camden Resource Recovery Facility, facility number 0408C, located in Camden City, Camden County, New Jersey.

i. All waste type 25 from the municipalities listed in (d)3 above, and ash from the operation of the South

Camden Resource Recovery Facility shall be disposed of at approved out-of-State facilities in accordance with the laws and regulations of the receiving state.

ii. All of the bypass and nonprocessible waste from the operation of the South Camden Resource Recovery Facility shall be disposed of at the Pennsauken Township Sanitary Landfill, facility numbers 0427D1SE01, 0427D1SE03, and 0427A-E1, located in Pennsauken Township, Camden County, New Jersey. Also, in the event that nonhazardous ash from the operation of the resource recovery facility cannot be disposed of at an out-of-State facility, such ash shall be disposed of at the Pennsauken Township Sanitary Landfill. (Effective January 13, 1992).

iii. In the event a unified rate system is established for all solid waste facilities within Camden County, all solid waste types 10, 13, 23, 25 and 27 generated from within Berlin Borough and Berlin Township shall be directed to the Winslow Township Transfer Station, facility number 0436I, located in Winslow Township, Camden County, New Jersey. Once transferred, the waste from the Winslow Township Transfer Station shall be disposed of at the South Camden Resource Recovery Facility, facility number 0408C, located [sic] in Camden City, Camden County, New Jersey, except that waste type 25 shall be directed from the transfer station to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

(e) Waste flows within, into and out of the Cape May County District:

1. All waste types 10, 13, 23, 25, and 27 generated from within the Cape May County municipalities of Avalon, Cape May City, Cape May Point Boro, Dennis, Lower, Middle, North Wildwood, Ocean City, Sea Isle City, Stone Harbor, Upper, West Cape May, West Wildwood, Wildwood, Wildwood Crest, and Woodbine shall be disposed of at the Cape May County regional landfill, facility number 0511C, located in Borough of Woodbine and Township of Upper, Cape May County, New Jersey.

(f) Waste flows within, into and out of the Cumberland County District:

1. All waste types 10, 13, 23, 25, and 27 generated from within the Cumberland County municipalities of Bridgeton, Commercial, Deerfield, Downe, Fairfield, Greenwich, Hopewell, Lawrence, Maurice River, Millville, Stow Creek, Shiloh, Upper Deerfield, and Vineland shall be disposed of at the Cumberland County regional landfill, facility number 0603B, located in Deerfield Township, Cumberland County, New Jersey.

(g) Waste flows within, into and out of the Essex County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within the Essex County municipalities of Irvington, Livingston, Maplewood, Millburn, and South Orange are hereby directed to the Waste Management of New Jersey Transfer Station, located at 100 Avenue A, in the City of Newark, Essex County, New Jersey.

2. All solid waste types 10, 23, 25, and 27 generated from within the Essex County municipality of Newark are hereby directed to the Waste Management of New

Jersey Transfer Station, located at 100 Avenue A, in the City of Newark, Essex County, New Jersey.

3. All solid waste types 10, 13, 23, 25, and 27 generated from within the Essex County municipalities of Belleville, Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange are hereby directed to the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at 442 Frelinghuysen Avenue, in the City of Newark, Essex County, New Jersey.

4. All solid waste type 13 generated from within the Essex County municipality of Newark is hereby directed to the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at 442 Frelinghuysen Avenue, in the City of Newark, Essex County, New Jersey.

5. Upon commencement of operations of the Solid Waste Transfer and Recycling, Inc. Transfer Station, located at Hill Street, in the City of Orange, Essex County, New Jersey, all solid waste types 10, 23, 25, and 27 generated from within the Essex County municipalities of Belleville, Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange shall be directed to this facility.

6. All solid waste types 10, 23, and 27 generated within the municipalities of Belleville, Bloomfield, Caldwell, Cedar Grove, East Orange, Essex Fells, Fairfield, Glen Ridge, Irvington, Livingston, Maplewood, Millburn, Montclair, Newark, North Caldwell, Nutley, Orange,

Roseland, South Orange, Verona, West Caldwell, and West Orange is directed to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey.

i. All waste types 13, 25 and nonprocessible type 27 from the municipalities listed in (g)6 above, shall be disposed of at approved out-of-State [sic] facilities in accordance with the laws and regulations of the receiving state. Out-of-State disposal shall be via the Solid Waste Transfer and Recycling, Inc., Transfer Station, facility number 0714R, located in Newark, Essex County, New Jersey.

7. Two hundred and fifty thousand (250,000) tons per year of processible solid waste types 10 and 23 generated from within Bergen County and processed at the transfer stations listed in (b)1 above shall be directed to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, Essex County, New Jersey. (Effective May 1, 1991). In addition, at the request of Essex County, processible solid waste types 10 and 23 generated within Bergen County in an amount not to exceed 1,600 tons per week in 1992, 2,000 tons per week from January 4, 1993 through February 28, 1993, and 1,700 tons per week from March 1, 1993 through July 31, 1993 shall be transported to the Essex County Resource Recovery Facility, facility number 0714X, located in Newark, New Jersey, on an as needed basis from one of the transfer stations set forth in (b)1 and 4 above.

i. All residual ash generated from the operation of the Essex County RRF shall be disposed of by the BCUA consistent with the agreement between the BCUA and

Essex County and in compliance with the Essex County RRF facility permit at permitted and approved out-of-State landfill facilities. (Effective May 1,-1991).

ii. Bypass waste and nonprocessible waste generated from the operation of the Essex County RRF shall be disposed of consistent with the agreement between the BCUA and Essex County and in accordance with the provisions of the approved Essex County District Solid Waste Management Plan. (Effective May 1, 1991).

(h) Waste flows within, into and out of the Gloucester County District:

1. All solid waste types 10, 13, 23, 25 and 27 generated from within the Gloucester County municipalities of Clayton, Deptford, East Greenwich, Elk, Franklin, Glassboro, Greenwich, Harrison, Logan, Mantua, Monroe, National Park, Newfield, Paulsboro, Pitman, South Harrison, Swedesboro, Washington, Wenonah, West Deptford, Westville, Woodbury, Woodbury Heights, and Woolrich, shall be disposed of at the Gloucester County Landfill, facility number 0816A, located in South Harrison Township, Gloucester County, New Jersey.

2. When the Gloucester County resource recovery facility becomes operational, solid waste types 10, 13, 23 and 25 generated in all of Gloucester County's municipalities shall be directed to the resource recovery facility, facility number 0820I, located in West Deptford Township, Gloucester County, New Jersey.

3. All bypass waste and nonhazardous ash from the resource recovery facility shall be disposed of at the Gloucester County Landfill, facility number 0816A,

located in South Harrison Township, Gloucester County, New Jersey.

(i) Waste flows within, into and out of the Hackensack Meadowlands District:

1. The Hackensack Meadowlands Development Commission shall accept certain waste flows from Bergen and Hudson Counties as described in (b) above and (j) below.

(j) Waste flows within, into and out of the Hudson County District:

1. All waste types 13, 23, 25, and 27 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York Town [sic] shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North Arlington, Bergen County, New Jersey for handling prior to transportation to out-of-State permitted disposal facilities in accordance with the laws and regulations of the receiving state. (Effective February 4, 1991).

2. All waste type 10 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York Town shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North

Arlington, Bergen County, New Jersey, for baling prior to disposal at the Hackensack Meadowlands Development Commission 1-E landfill, facility number 0907W, located in North Arlington, Bergen County, New Jersey. (Effective February 4, 1991).

3. Upon closure of the HMDC 1-E landfill, all waste type 10 generated from within the Hudson County municipalities of Bayonne City, East Newark Boro, Guttenberg Town, Harrison Town, Hoboken City, Jersey City, Kearny Town, North Bergen Township, Secaucus Town, Union City, Weehawken Township and West New York Town shall be directed to the Hackensack Meadowlands Development Commission Baler facility, facility number 0239C, located in North Arlington, Bergen County, New Jersey for handling prior to transportation to out-of-State permitted disposal facilities in accordance with the laws and regulations of the receiving state. (Effective February 4, 1991).

(k) Waste flows within, into and out of the Hunterdon County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within the Hunterdon County municipalities of Alexandria, Bethlehem, Bloomsbury, Califon, Clinton Town, Clinton Township, Delaware, East Amwell, Flemington, Franklin, Glen Gardener, Hampton, High Bridge, Holland, Kingwood, Lambertville, Lebanon Boro, Lebanon Township, Milford, Raritan, Readington, Tewksbury, Union and West Amwell shall be transported to the Hunterdon County transfer station, facility number 1006B, located in Clinton Township, Hunterdon County.

2. All solid waste types 10, 13, 23, 25, and 27 generated from within the Hunterdon County municipalities of Stockton and Frenchtown shall be transported to the Hunterdon County transfer station, facility number 1006B, located in Clinton Township, Hunterdon County.

3. Up to 100 tons per day of processible solid waste generated within Hunterdon County shall be transported from the Hunterdon County Transfer Station, facility number 1006B, located in Clinton Township, Hunterdon County, New Jersey, to the Warren County Resource Recovery Facility, facility number 2117A, located in Oxford Township, Warren County, New Jersey, through the year 2001. (Effective June 1, 1988).

(l) Waste flows within, into and out of the Mercer County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within all Mercer County municipalities shall be directed to the Mercer County Transfer Station, facility number 1102D, located in Ewing Township, Mercer County, New Jersey, for processing prior to disposal at the G.R.O.W.S. landfill in Bucks County, Pennsylvania, in accordance with the laws and regulations of the receiving state. (Effective November 1, 1988).

(m) Waste flows within, into and out of the Middlesex County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within all municipalities in Middlesex County shall be disposed of at the Middlesex County Utilities Authority Landfill (Edgeboro), facility number 1204A,

located in East Brunswick, Middlesex County, New Jersey. (Effective July 19, 1990).

(n) Waste flows within, into and out of the Monmouth County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within all Monmouth County municipalities shall be disposed of at the Monmouth County Reclamation Center Landfill and Shredder Facility, facility numbers 1336F and 1336D, located in Tinton Falls Borough, Monmouth County, New Jersey.

(o) Waste flows within, into and out of the Morris County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within the Morris County municipalities of Chester Borough, Chester Township, Dover, Jefferson, Mendham Borough, Mendham Township, Mine Hill, Mount Arlington, Mount Olive, Netcong, Randolph, Rockaway Borough, Rockaway Township, Roxbury, Victory Gardens, Washington, and Wharton shall be directed to the Morris County Transfer Station, facility number 1427F, located in Mount Olive Township, Morris County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

2. All solid waste types 10, 13, 23, 25, and 27 generated from within the Morris County municipalities of Boonton Borough, Boonton Township, Butler, Chatham Borough, Chatham Township, Denville, East Hanover, Florham Park, Hanover, Harding, Kinnelon, Lincoln Park, Madison, Montville, Morris Plains, Morris Township,

Morristown, Mountain Lakes, Parsippany-Troy Hills, Passaic, Pequannock, and Riverdale shall be directed to the Morris County Transfer Station, facility number 1429J, located in Parsippany-Troy Hills Township, Morris County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

(p) Waste flows within, into and out of the Ocean County District:

1. All solid waste types 10, 13, 23, 25, and 27 generated from within all Ocean County municipalities shall be disposed of at the Ocean County Landfill Corporation landfill, facility number 1518B, located in Manchester Township, Ocean County, New Jersey.

(q) Waste flows within, into and out of the Passaic County District:

1. All solid waste types 10 (except medical wastes), 13 (except large bulky wastes including such items as cable larger than six feet, foam insulation, tires, etc.), 23 (except leaves), 25, and 27 (except dry industrial waste such as plastics, rags, bulk powders, and containers with tar and paint residues, etc.) generated from within the Passaic County municipalities of Haledon, Hawthorne, North Haledon, Passaic City, Prospect Park, and Paterson shall be directed to the Pen Pac, Inc., Fulton Street Transfer Station, facility number 1608H, located in the City of Paterson, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state. (Effective January 23, 1989).

2. Upon issuance of all required departmental permits, all solid waste types 10 (except medical wastes), 13 (except large bulky wastes including such items as cable larger than six feet, foam insulation, tires, etc.), 23 (except leaves), 25, and 27 (except dry industrial waste such as plastics, rags, bulk powders, and containers with tar and paint residues, etc.) generated from within the Passaic County municipalities of Bloomingdale, Clifton, Little Falls, Pompton Lakes, Ringwood, Totowa, Wanaque, Wayne, West Milford, and West Paterson shall be directed to the Pen Pac, Inc., Totowa Transfer Station, facility number 1612B, located in Totowa Borough, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

3. Only solid waste types 10, 13, and 27, which are prohibited from the Fulton Street and Totowa Transfer Stations as indicated in (q)1 and 2 above, generated from all Passaic County municipalities shall be directed to Pen Pac, Inc., Iowa Avenue Transfer Station, facility number 1608A, located in the City of Paterson, Passaic County, New Jersey. Waste received at this facility will be transported to permitted out-of-State disposal facilities in accordance with the laws and regulations of the receiving state.

(r) Waste flows within, into and out of the Salem County District:

1. All waste types 10, 13, 23, 25 and 27 generated from within the Salem County municipalities of Alloway, Carney's Point, Elmer, Elsinboro, Lower Alloways Creek,

Mannington, Oldmans, Pennsville, Penns Grove, Pilesgrove, Pittsgrove, Quinton, Salem City, Upper Pittsgrove and Woodstown, shall be disposed of at the Salem County regional landfill, facility number 1701B, located in Alloway Township, Salem County, New Jersey.

(s) Waste flows from within, into and out of the Somerset County District:

1. All nonputrescible, recyclable (commercial and institutional) waste type 10 and all waste type 27 generated from within the Somerset County municipalities of Bound Brook, Franklin, Manville, Millstone, Montgomery, Raritan, Rocky Hill, Somerville, and South Bound Brook, shall be directed to the Somerset Intermediate Recycling Center Transfer Station, facility number 1808K, located in Franklin Township, Somerset County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

2. All solid waste types 10, 13, 23, 25, and 27 generated from within the Somerset County municipalities of Bedminster, Bernards, Bernardsville, Branchburg, Bridgewater, Far Hills, Green Brook, Hillsborough, North Plainfield, Peapack-Gladstone, Warren, and Watchung, and all solid waste types 10, 13, 23, and 25 generated from within the Somerset County municipalities of Bound Brook, Franklin, Manville, Millstone, Montgomery, Raritan, Rocky Hill, Somerville, and South Bound Brook not directed to the Somerset Intermediate Recycling Center Transfer Station, shall be directed to the Bridgewater Resources, Inc. Transfer Station, facility number 1806A, located in Bridgewater Township, Somerset County, New

Jersey, prior to disposal at permitted out-of-State [sic] facilities in accordance with the laws and regulations of the receiving state or pursuant to (s)3 below. (Effective January 2, 1988).

3. Up to 1,400 tons per week of processible solid waste generated within Somerset County shall be transported from the Bridgewater Resources, Inc. Transfer Station to the Warren County Resource Recovery Facility, facility number 2117A, located in Oxford Township, Warren County, New Jersey, through the year 2001. (Effective June 30, 1989). From January 1, 2002 through November 30, 2008, Somerset County shall increase the processible waste it directs to the Warren County Resource Recovery Facility to 1,977 tons per week.

(t) Waste flows within, into and out of the Sussex County District:

1. All solid waste types 10, 13 and 23 generated from within the Sussex County municipality of Hopatcong shall be disposed of at Hopatcong Sanitary Landfill, facility number 1912A, located in Hopatcong Borough, Sussex County, New Jersey.

i. Upon closure of this facility, all solid waste types 10, 13 and 23 generated from the Sussex County municipality of Hopatcong Borough shall be disposed of at the new Sussex County Landfill, facility number 1913C, located in Lafayette Township, Sussex County, New Jersey.

ii. All solid waste types 25 and 27 generated from within the Sussex County municipality of Hopatcong Borough shall be disposed of at the Sussex County Landfill,

facility number 1913C located in Lafayette Township, Sussex County, upon commencement of operations. Prior to commencement of landfill operations, waste shall be disposed of at the Sussex County Transfer Station, facility number 1913D.

2. All solid waste types 10, 13, 23, 25 and 27 generated from within the Sussex County municipalities of Andover Borough, Andover Township, Branchville, Byram, Frankford, Franklin, Fredon, Green, Hamburg, Hampton, Hardyston, Lafayette, Montague, Newton, Ogdensburg, Sandyston, Sparta, Stanhope, Stillwater, Sussex, Vernon, Walpack and Wantage shall be disposed of at the Sussex County Landfill, facility number 1913C, located in Lafayette Township, Sussex County, New Jersey, upon commencement of operations. Prior to the commencement of landfill operations, waste shall be disposed of at the Sussex County Transfer Station, Facility Number 1913D.

(u) Waste flows within, into and out of the Union County District:

1. All solid waste type 10 collected by municipal vehicles and generated from within the Union County municipalities of Summit and New Providence shall be directed to the Summit Transfer Station, facility number 2018A, located in Summit, Union County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

2. All solid waste types 10, 13, and 23 generated from within the Union County municipality of Linden and collected by municipal vehicles shall be disposed of

at the Linden Landfill, facility number 2009A, located in Linden, Union County, New Jersey. (Effective January 2, 1988).

3. All solid waste types 10, 13, and 23 formerly delivered by private citizens to the Elizabeth Public Works Convenience Center and all solid waste types 10, 13, and 23 generated from within the Union County municipalities of Elizabeth, Hillside, Roselle, Roselle Park, and Union Township and collected by municipal vehicles or White Brothers Trucking, and all solid waste types 10 and 13 generated by hospitals from within these same Union County municipalities shall be directed to the Ellesor Transfer Station, facility number 2004D, located in Elizabeth, Union County, New Jersey, prior to disposal at permitted out-of- State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

4. All solid waste types 10, 13, 23, 25, and 27 generated from within the Union County municipalities of Berkeley Heights, Clark, Cranford, Fanwood, Garwood, Kenilworth, Mountainside, Plainfield, Rahway, Scotch Plains, Springfield, Westfield, and Winfield; all solid waste type 10 generated within the Union County municipalities of New Providence and Summit not directed to the Summit Transfer Station pursuant to (u)1 above; all solid waste type[s] 13, 23, 25, and 27 generated from within the Union County municipalities of New Providence and Summit; all solid waste types 10, 13, and 23 generated from within the Union County municipalities of Elizabeth, Hillside, Roselle, Roselle Park, and Union Township not directed to the Ellesor Transfer Station pursuant to (u)3 above; all solid waste types 25 and 27

generated from within the Union County municipalities of Elizabeth, Hillside, Roselle, Roselle Park, Union Township and Linden; and all solid waste types 10, 13 and 23 generated within the Union County municipality of Linden not directed to the Linden Landfill pursuant to (u)2 above, shall be directed to the Automated Modular Systems Transfer Station, facility number 2009I, located in Linden, Union County, New Jersey, prior to disposal at permitted out-of-State facilities in accordance with the laws and regulations of the receiving state. (Effective January 2, 1988).

5. For the purposes of this rule for Union County, municipal vehicles shall constitute collection vehicles owned or operated by a municipality, or collection vehicles owned or operated by a private entity which operates pursuant to a municipal contract.

6. When the Union County resource recovery facility, facility number 2013C, located in Rahway City, Union County, becomes operational, processible [sic] nonrecyclable [sic] solid wastes generated from all Union County municipalities shall be redirected to the energy recovery facility. Ash from the resource recovery facility and all bypass and nonprocessible waste shall be disposed of at the Empire Landfill located in Lackawanna County, Pennsylvania, in accordance with the laws and regulations of the receiving state.

(v) Waste flows within, into and out of the Warren County District:

1. All processible portions of solid waste types 10, 23, and 27 generated from within all Warren County municipalities shall be disposed of at the Warren County

Resource Recovery Facility, facility number 2117A, located in Oxford Township, Warren County, New Jersey. (Effective June 1, 1988).

2. All nonprocessible, nonrecyclable portions of solid waste types 10, 23, and 27, all solid waste types 13 and 25 generated from within all Warren County municipalities, and all ash, bypass and nonprocessible waste from the Warren County Resource Recovery Facility shall be disposed of at the Warren County Landfill, facility 2123D, located in White Township, Warren County, New Jersey. (Effective June 1, 1988).

3. Up to 100 tons per day of processible solid waste generated from within Hunterdon County shall be transported from the Hunterdon County Transfer Station, facility number 1006B, located in Clinton Township, Hunterdon County, New Jersey, to the Warren County Resource Recovery Facility through the year 2001. (Effective June 1, 1988).

4. Up to 1,400 tons per week of processible solid waste generated from within Somerset County shall be transported from the Bridgewater Resources Transfer Station, facility number 1806A, located in Bridgewater Township, Somerset County, New Jersey, to the Warren County Resource Recovery Facility through the year 2001. (Effective June 30, 1989). From January 1, 2002 through November 30, 2008, Somerset County shall increase the processible waste it directs to the Warren County Resource Recovery Facility to 1,977 tons per week.

(w) The dates set forth in parentheses in the preceding subsections indicate when the emergency redirection

orders originally implementing the subsections provisions became effective.

(x) If any section, subsection, provision, clause, or portion of this subchapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-5567, 96-5568, 96-5569 and 96-5570

ATLANTIC COAST DEMOLITION & RECYCLING, INC.,

Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY; ATLANTIC COUNTY UTILITIES AUTHORITY; BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY; POLLUTION CONTROL FINANCING AUTHORITY OF CAMDEN COUNTY; SCOTT A. WEINER, Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy,

Defendants,

MERCER COUNTY IMPROVEMENT AUTHORITY; HUDSON COUNTY IMPROVEMENT AUTHORITY; ESSEX COUNTY UTILITIES AUTHORITY; PASSAIC COUNTY UTILITIES AUTHORITY; CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY; CAMDEN COUNTY ENERGY RECOVERY ASSOCIATES, L.P.,

Intervenor-Defendants

(Camden New Jersey District Civil No. 93-cv-02669)

C & A CARBONE, INC.; BRET SCHUNDLER, MAYOR, in his capacity as Mayor of CITY OF JERSEY CITY; JOHN ROONEY, MAYOR, in his capacity as Mayor of BOROUGH OF NORTHVALE; NATIONAL SOLID

WASTE MANAGEMENT ASSOCIATION, NEW JERSEY CHAPTER; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY; CITY OF PASSAIC; CITY OF PATERSON; DWIGHT DESTEFAN, MAYOR, Individually and in his capacity as Mayor of the Township of River Vale,

Plaintiffs,

v.

ROBERT C. SHINN, JR., Individually and in his capacity as Commissioner of New Jersey Department of Environmental Protection and Energy; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY; LARRY J. MCCLURE, Individually and in his official capacity as Executive Director of the Bergen County Utilities Authority; BERGEN COUNTY UTILITIES AUTHORITY; MARK GUARINO, Individually and in his official capacity as Director of the Bergen County Health Department; BERGEN COUNTY HEALTH DEPARTMENT; KENNETH BLANE, Individually and in his official capacity as Executive Director of the Hudson County Improvement Authority; HUDSON COUNTY IMPROVEMENT AUTHORITY; CAROL ANN WILSON, Individually and in her official capacity as Director of the Hudson County Health Department; WILLIAM P. SCHUBER, Individually and in his official capacity as County Executive for Bergen County; ROBERT C. JANISZEWSKI, Individually and in his official capacity as County Executive for Hudson County; PASSAIC COUNTY UTILITIES AUTHORITY; ANTHONY ROSS, Individually and in his capacity as Executive Director; NICOLA R. DIDONNA, individually and in his capacity as County Executive for the County of Passaic

(Camden New Jersey District Civil No. 94-cv-03244)

National Solid Wastes Management Association; Waste Management Association of New Jersey; and C & A Carbone,

Appellants in 96-5567.

New Jersey Department of Environmental Protection; SCOTT A. WEINER; and ROBERT C. SHINN, Jr., Commissioner,

Appellants in 96-5568.

Cape May County Municipal Utilities Authority ("CMCMUA")

Appellants in 96-5569

Essex County Utilities Authority; Hudson County Improvement Authority; Mercer County Improvement Authority; and Passaic County Utilities Authority,

Appellants in 96-5570

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, and GARTH,* *Circuit Judges*

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing filed by cross-appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted

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* As to panel rehearing only.

for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: June 5, 1997

APPENDIX G

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al., Plaintiffs,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, et al., Defendants.

Civ. A. Nos. 93-2669 (JEI), 94-3244 (JEI).

United States District Court, D. New Jersey.

June 9, 1995.

Pennsylvania operator of transfer station and recycling center for construction and demolition debris brought action asserting commerce clause challenge to constitutional validity of New Jersey solid waste flow regulations. The District Court entered judgment against operator, and operator appealed. The Court of Appeals, 48 F.3d 701, reversed and remanded. On remand, action was consolidated with action brought by trade associations and municipal plaintiffs raising essentially same challenges to New Jersey solid waste flow regulations. On plaintiffs' motion for preliminary injunction, the District Court, Irenas, J., held that: (1) operator's motion for preliminary injunctive relief would be conditionally granted; (2) associations' motion for preliminary relief would be denied, particularly given possible irreparable harm to defendants and public from broad injunctive relief requested; and (3) municipal plaintiffs lacked constitutional rights against state and county authorities.

Ordered accordingly.

Mesirov Gelman Jaffe Cramer & Jamieson by Mitchell Feigenbaum, Haddonfield, NJ, for plaintiff Atlantic Coast Demolition & Recycling, Inc.

Steptoe & Johnson by William T. Hassler, Washington, DC, for plaintiffs Nat. Solid Waste Management Ass'n, Waste Management Ass'n of New Jersey, Bret Schundler, the Mayor of the City of Jersey City, NJ, John Rooney, the Mayor of the Borough of Northvale, NJ, the City of Passaic, NJ, and the City of Patterson, NJ.

Deborah T. Poritz, Atty. Gen. by Gail M. Lambert, Stefanie A. Brand, Deputy Atty. Gen., Dept. of Law and Public Safety, Div. of Law, Newark, NJ, for defendant Scott A. Weiner.

DeCotiis, Fitzpatrick & Gluck by J.S. Lee Cohen, Hackensack, NJ, for intervenor-defendants Hudson County Improvement Authority, Mercer County Improvement Authority, Essex County Utilities Authority, and Passaic County Utilities Authority.

Wolff & Samson, P.C. by David Samson, Roseland, NJ, for intervenor-defendant Camden County Energy Recovery Associates, L.P.

Sinisi, Van Dam & Sproviero by Stephen P. Sinisi, Paramus, NJ, for defendant Bergen County Utilities Authority.

OPINION

IRENAS, District Judge:

Plaintiffs in these consolidated cases have brought challenges under the dormant Commerce Clause[1] to portions of the New Jersey Solid Waste Management Act, *N.J.S.A.* 13:1E-1 to -207 ("SWMA"), the Solid Waste Utility Control Act ("SWUCA"), and regulations promulgated thereunder, *N.J.A.C.* 7:26, a group of statutes and regulations that the Court shall refer to collectively as the "waste flow regulations." Certain plaintiffs have now moved for a preliminary injunction.

The Court finds that plaintiff Atlantic Coast Demolition and Recycling, Inc. ("Atlantic Coast") has shown a likelihood of success on the merits and irreparable injury, and that on the basis of the current record these factors outweigh the irreparable injury that the narrow preliminary relief requested could cause to defendants and the public. However, because of the Court's concerns that the requested relief might cause serious irreparable harm to the defendants and the public, and because of important issues of comity, the Court will condition the grant of the

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[1] U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although the Commerce Clause "thus speaks in terms of powers bestowed upon Congress," courts have "long recognized that it also limits the power of States to erect barriers against interstate trade." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 710 (3d Cir.1995) (internal quotations omitted).

requested relief upon the consideration of further submissions by defendants regarding potential alternatives to the current regulations and the impact of these regulations on defendants and the public.

As to plaintiffs National Solid Waste Management Association ("NSWMA") and Waste Management Association of New Jersey ("WMANJ," and along with NSWMA, the "association plaintiffs"), the Court finds that their likelihood of success and the irreparable injury that they suffer due to the waste flow regulations are outweighed by the irreparable harm that their request for preliminary relief would cause defendants and the public. The motion of the association plaintiffs will therefore be denied. Finally, as to plaintiffs Bret Schundler, the Mayor of the City of Jersey City, New Jersey, John Rooney, the Mayor of the Borough of Northvale, New Jersey, the City of Passaic, New Jersey, and the City of Patterson, New Jersey (collectively the "municipal plaintiffs"), the Court finds that these plaintiffs have no claim against defendants and they will be dismissed from the case.

PROCEDURAL HISTORY

Plaintiffs in this case come from two consolidated cases, *Atlantic Coast Demolition & Recycling, Inc., v. Board of Chosen Freeholders, et al.*, Civ. No. 93-2669 (JEI), and *C & A Carbone, et al. v. Shinn, et al.*, Civ. No. 94-3244 (JEI). The *Atlantic Coast* case was filed on June 23, 1993, and Atlantic Coast, the sole plaintiff in that matter, moved for a temporary restraining order. On September 2, 1993 after a period of intensive discovery, the Court held a hearing, and on September 8, 1993, rendered its oral findings of

fact and conclusions of law. Following the Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir.1988), the Court concluded that the waste flow regulations should be analyzed under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and that the state interest served by the waste flow regulations outweighed any burden on interstate commerce. The Court therefore denied Atlantic Coast's application for a temporary restraining order, and on February 28, 1994, with the consent of the parties, entered final judgment in defendants' favor on the basis of its prior findings of fact and conclusions of law.

Atlantic Coast appealed. In an opinion filed February 16, 1995, the Third Circuit reversed this Court's decision and remanded the case for further proceedings. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir.1995). The court concluded that in light of the Supreme Court's recent decision in *C & A Carbone, Inc. v. Clarkstown*, ___ U.S. ___, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), which was decided after this Court's entry of final judgment, New Jersey's waste flow regulations discriminate against interstate commerce and are subject to heightened scrutiny under the dormant Commerce Clause rather than the less strict *Pike* balancing test. 48 F.3d at 713. However, the court also held that it would leave the district court to determine whether the regulations could be upheld under strict scrutiny. *Id.* at 718. In doing so, the court specifically stated that "Atlantic Coast is free at any time to apply again for *pendente lite* relief." *Id.*

On April 12, 1995, this Court granted the motions of Hudson County Improvement Authority, Mercer County Improvement Authority, Essex County Utilities Authority, Passaic County Utilities Authority (the "county authorities") and Camden County Energy Recovery Associates, L.P., ("CCERA") to intervene as defendants. On that date, Atlantic Coast filed the instant request for *pendente lite* relief.

The *C & A Carbone* case was filed on July 11, 1994, and assigned to the Newark vicinage. The case raises essentially the same challenges to the New Jersey waste flow regulations as those brought in *Atlantic Coast*. The case was stayed pending the Third Circuit's decision in *Atlantic Coast*, and when that case was remanded, *C & A Carbone* was transferred to this Court. On April 12, 1995, this Court granted defendants' motion to consolidate the case with *Atlantic Coast*. On April 17, 1995, the association plaintiffs and the municipal plaintiffs in *C & A Carbone* moved for *pendente lite* relief.

Since the filing of the preliminary injunction motions, the parties have engaged in extensive discovery that delayed the preliminary injunction hearing. The Court set June 6, 1995, as the date for the hearing, and in accordance with the Third Circuit' [sic] opinion, indicated that it would exercise its discretion "to reopen the record for supplementary evidence." 48 F.3d at 718 n. 21. The parties, however, elected not to offer further oral testimony, but rather elected to proceed on the basis of the previous record before this Court and the briefs, exhibits, and affidavits submitted in connection with the preliminary injunction motions and defendants' responses thereto. The Court held oral argument on the motions on June 6,

1995, and now renders its findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

The Court hereby adopts its Findings of Fact Numbers One through Twenty-Six of its oral opinion rendered September 8, 1993. These findings relate primarily to the waste disposal problems in New Jersey, the flow control regulations, and Atlantic Coast's efforts to be included in the flow control scheme. The Third Circuit specifically upheld these findings. *Atlantic Coast*, 48 F.3d at 704 n. 2. The Court also adopts the Third Circuit's detailed discussion of the New Jersey solid waste management system and Atlantic Coast's activities. 48 F.3d at 704-09. The following additional findings of fact are based on the exhibits and affidavits submitted by the parties in conjunction with the preliminary injunction motions.

1. Between February and September of 1993, Atlantic Coast received approximately 15,800 tons of construction and demolition ("C & D") waste from New Jersey, resulting in approximately $90,000 in monthly revenue. (Dengler Decl. at ¶ 3.) From 1993 to February 1995, when Atlantic Coast was not receiving New Jersey waste, its average monthly net loss increased from $27,237 to $80,607. (Durkin Decl. at ¶¶ 2-4.) Atlantic Coast's exclusion from New Jersey has also resulted in many of its New Jersey waste haulers refusing to pay outstanding bills, because Atlantic Coast could no longer process this waste and therefore had little leverage to collect this money. Atlantic Coast now shows $233,000 in bad debt on

total New Jersey sales of $630,000, for a bad debt ratio of approximately 27% as compared to an overall bad debt ratio of 6%. (*Id.* at ¶ 6.)

2. Despite Atlantic Coast's poor financial performance, its parent corporation, United Waste Systems, Inc., has continued to finance Atlantic Coast, primarily in the hope that Atlantic Coast's entry into the New Jersey market will increase its profitability. (Sheehan Decl. at ¶¶ 9-11.)[2] On the other hand, if New Jersey's waste flow scheme is finally declared constitutional, United Waste intends to either shut down or sell the Atlantic Coast facility (*Id.* at ¶¶ 12-13.) However, United Waste will continue to support Atlantic Coast pending the final resolution of this case.

3. NSWMA and WMANJ are both trade associations made up of private companies in the solid waste disposal industry. NSWMA members include transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, recyclers of solid waste, and manufacturers and distributors of solid waste management equipment. WMANJ members include New Jersey collection companies, waste transporters, transfer stations, materials recovery facilities, and recycling facilities. Associate members of WMANJ include New Jersey vehicle and

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[2] In an attempt to show that Atlantic Coast's financial problems are not as severe as it states, defendants have offered evidence establishing that United Waste has continued to support Atlantic Coast. (*See* CCERA Brief at Exs. "A"-"E".) The Court accepts this fact, but nonetheless finds that Atlantic Coast is losing money at a quicker rate than it was when it could do business in New Jersey without returning the residual waste to a designated New Jersey facility.

equipment providers, maintenance companies, consultants, and various professionals such [sic] insurance brokers.

4. Out of state members of the NSWMA who process solid waste are affected by the New Jersey waste flow regulations in primarily the same way as Atlantic Coast. They are either effectively excluded from the New Jersey market or, if they are included in a district plan and obtain the requisite state and local approvals, may deal in New Jersey waste under the now-codified "Pereira policy." *N.J.A.C.* 7:26-6.9 *and* 26-2B.9. Nonetheless, the processor must still return any residual waste to the disposal facility designated by that district plan or pay the tipping fee[3] that the facility would charge, *see id.*, a fee that often exceeds what the processor would pay at an out of state facility. Furthermore, out of state NSWMA disposal facilities are precluded from accepting New Jersey waste unless they are accepted into a district plan, a contingency that is unlikely unless the district is unable to locate sufficient disposal capacity within that district or another district. *See* 48 F.3d at 707-08. New Jersey NSWMA and WMANJ members are primarily affected by the waste flow regulations because they require them to dispose of solid waste at designated New Jersey solid waste facilities and pay the requisite tipping fee rather than disposing of the waste at the facility of their choice, either within or outside the state.

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[3] "Tipping fees are the rates that a disposal facility or transfer station charges the hauler who deposits waste at the facility." *Atlantic Coast*, 48 F.3d at 707 n. 10 (citing *J. Filiberto*, 857 F.2d at 916 (3d Cir.1988)).

5. Jersey City, Northvale, Passaic, and Patterson are all New Jersey municipalities in the northern part of the state. Plaintiff Bret Schundler is the Mayor of Jersey City and plaintiff John Rooney is the Mayor of Northvale, although both mayors are named as plaintiffs simply in their official capacities as mayors of the municipalities and not as taxpayers or in any other capacity that would make their interest in the case any different from that of the municipality that they represent. All of the municipal plaintiffs are required to dispose of waste generated in the municipality through the waste flow plan devised by the district in which that municipality is located. If the municipal plaintiffs were not restrained by the waste flow regulations, they could, at least in the immediate future, obtain municipal waste disposal services at a lower cost than is currently available. (Guerra Aff. at ¶ 12; Dopirak Aff. at ¶ 12; Czech Aff. at ¶ 11; Rooney Aff. at ¶ 11.)

6. Intervenor-defendants Passaic County Utilities Authority, Essex County Utilities Authority, Hudson County Improvement Authority, and Mercer County Improvement Authority are each Solid Waste Management Districts established by the 1975 amendments to the SWMA. *N.J.S.A.* 13:1E-20. Each authority promulgates a district plan, which consists of some combination of designated disposal facilities, transfer stations, and contracts for the disposal and hauling of waste. *See, e.g., N.J.A.C.* 7:26-6. Not all solid waste, however, is ultimately disposed of within the boundaries of the state of New Jersey. For example, much of the solid waste handled by the Mercer County Improvement Authority is ultimately disposed of in the G.R.O.W.S. landfill in Bucks County, Pennsylvania. *N.J.A.C.* 7:26-6.5(1). Nonetheless, this

waste still passes through the Mercer County Transfer Station, *id.*, which charges a tipping fee that is generally conceded to be above market rate.

7. If the waste flow regulations are disrupted, the revenues of the county authorities would be similarly disrupted. This effect would be caused by a loss of business to out of state processing and disposal facilities or by lower rates charged to compete with these facilities. (Lambert Cert. at ¶ 12; Lund Cert. at ¶ 30; Ross Aff. at ¶ 18; Vaccarino Cert. at ¶ 15.) Furthermore, in reliance upon the steady revenue generated by the waste flow regulations, the county authorities have incurred over one billion dollars in debt in the form of revenue bonds and contractual obligations, much of which is guaranteed by the respective counties, other public authorities such as the Port Authority of New York and New Jersey, or financial institutions. Wholesale disruption of the waste flow regulations could impair the ability of the county authorities to finance this debt and could ultimately force them into default on the bonds or contractual obligations. (Whelan Aff. at ¶¶ 4-5.)

8. Intervenor-defendant CCERA owns and operates the South Camden Resource Recovery Facility ("SCRRF"), an incinerator that acts as the disposal facility for much of the solid waste generated in Camden County, New Jersey. *See N.J.A.C.* 7:26-6.5(d). Because the disposal of solid waste at the SCRRF is generally more expensive than at an out of state disposal facility, SCRRF would not operate at full capacity if the waste flow regulations were enjoined, with a concomitant loss of income by CCERA. (Karpenski Decl. at ¶ 12.)

9. New Jersey generates approximately seven million tons of solid waste per annum, or approximately 24,500 tons per day. (Sondermeyer Aff. at ¶ 2.) 75% of this waste is type 10, or residential and commercial municipal waste, 20% is type 13, or bulky and construction waste, and the remaining 5% is made up of other types of waste.

10. New Jersey currently requires all waste transported out of the state to pass through a transfer station. (*Id.* at ¶ 5.) Currently, New Jersey has the transfer station capacity to inspect only about 14% of the solid waste generated in the state. (*Id.* at ¶ 6.) Therefore, New Jersey could not maintain this policy if the waste flow regulations were immediately dismantled. The unregulated transportation of waste out of the state would present environmental hazards. (*Id.* at 7.)

11. Approximately 469 solid waste collectors currently hold certificates to do business in New Jersey. (*Id.* at 9.) These haulers are required by state statute to file a tariff with the state. *See N.J.S.A.* 48:13A-7.1 *et seq.* While the rates charged by the waste haulers are now relatively stable due to the constraints of the waste flow system, dismantling the system would change the operating expenses of these haulers and require each hauler to file a new tariff each time it changed its rate. (*Id.* at ¶¶ 9-10.)

12. The waste management plan envisioned under the SWMA depends heavily upon the steady revenue flow to each county authority described above. (Gates Cert. at ¶ 1.) Therefore, dismantling the waste flow regulations and allowing out-of-state competition could suddenly disrupt the entire scheme of waste flow management in New Jersey. (*Id.* at ¶ 8.) In the long term,

this disruption will discourage (a) the creation of new waste disposal facilities and (b) the maintenance and expansion of existing facilities unless a new comprehensive regulatory scheme is implemented. On the basis of the current record, the Court cannot determine if such a system is feasible in light of Commerce Clause restrictions.

CONCLUSIONS OF LAW

I. *Preliminary Injunction Standard*

In order to obtain a preliminary injunction, the moving party must show "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured *pendente lite* if relief is not granted. . . . " *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir.1994) (internal quotations omitted). A failure to show either of these elements will result in the denial of the injunction. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir.1989). Where relevant, the court should also take into account (3) the possibility of harm to other persons from the grant or denial of the injunction, and (4) the public interest. *Id.; Eli Lilly and Co. v. Premo Pharmaceutical Labs., Inc.*, 630 F.2d 120, 126 (3d Cir.), *cert. denied*, 449 U.S. 1014, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980). The grant or denial of a preliminary injunction lies within "the sound discretion of the district judge, who must balance all of these factors in making a decision." *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir.1982). All four factors should favor preliminary relief before the injunction is granted. *American Tel. & Tel. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir.1994) ("*AT & T*"), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1838, 131

L.Ed.2d 757 (1995); *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir.1992).

II. *Analysis*

A. *Atlantic Coast*

1) *Likelihood of Success on the Merits*

In light of the Third Circuit's decision, the Court finds that Atlantic Coast has made a *prima facie* showing of likelihood of success on the merits. Under the "heightened scrutiny" test adopted by the Third Circuit, " 'the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.' " 48 F.3d at 717 (quoting *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986)). The Supreme Court recently phrased this test as requiring the state to prove "that it has no other means to advance a legitimate local interest." *C & A Carbone*, ___ U.S. at ___, 114 S.Ct. at 1683. For the purposes of this motion, the Court finds that defendants have not "accomplished the much more onerous task of demonstrating that there is no alternative to its waste flow regulations that would accomplish its legitimate objectives." *Atlantic Coast*, 48 F.3d at 718.

While defendants devote substantial portions of their briefs to the likelihood of success on the merits, their arguments do not seriously contradict the assertion that, at this stage of the litigation, Atlantic Coast is likely to succeed on its claim. First, defendants argue that if Atlantic Coast's case were certain to succeed, the Third Circuit

would not have remanded the case for further proceedings, but rather would have directed this Court to enter judgment in favor of Atlantic Coast. While this argument possesses a certain simplistic appeal, it does not recognize that a plaintiff seeking injunctive relief need show only a *likelihood* of success on the merits, not a *certainty* of success. Indeed, the Third Circuit noted that while the Court had denied Atlantic Coast's previous application for preliminary relief, Atlantic Coast's likelihood of success was "materially different" under the more stringent heightened scrutiny test. 48 F.3d at 718.

Defendants also point to a number of arguably legitimate state interests served by the waste flow regulations, such as avoiding out-of-state waste disposal liability, financing, inspecting solid waste, maintaining sufficient disposal capacity, waste management planning, and maintaining incinerators. (County Authorities' Brief at 46-49.) However, while invited to reopen the record, defendants have not offered any expert or other testimony to show that no feasible nondiscriminatory alternatives could adequately serve these goals. Instead, defendants simply state why systems adopted by other states would not work in New Jersey, (State's Brief at 33-39), and that it is not clear that feasible alternatives exist to the current scheme. (County Authorities' Brief at 50.) These arguments do not meet the "onerous" burden of showing that even the relatively simple (some would say simplistic) alternatives suggested by the Supreme Court in *C & A Carbone*, the "unobstructed flow of interstate commerce" and "general taxes or municipal bonds," would be infeasible alternatives to the current discriminatory regime.

Finally, defendants note that the United States Senate has recently passed a bill that would retroactively authorize municipal waste flow regulations, S. 534, 104th Cong., 1st Sess. (May 16, 1995), and that a similar bill was recently reported to the House floor by the Commerce Committee, House of Rep. Comm. on Commerce, 104th Cong., 1st Sess., *A Bill to Amend the Solid Waste Disposal Act* (May 16, 1995.) Because Congress may affirmatively authorize states to regulate interstate commerce, *see Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir.1987), passage of this bill would resolve the controversy over the New Jersey waste flow regulations. Nonetheless, congressional bills, even those overwhelmingly passed by one house of Congress,[4] often stall in the legislative process, and defendants have not cited the Court to any authority that it should abstain from granting preliminary injunctive relief based on the contingency that Congress might enact the law at issue.[5] Therefore, Atlantic Coast has made a strong showing of likelihood of success on the merits.

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[4] The Senate passed S. 534 by a vote of 94-6. 141 Cong.Rec. S6722 (daily ed. May 16, 1995.)

[5] At oral argument, the state cited *Black United Fund of New Jersey v. Kean*, 763 F.2d 156 (3d Cir.1985), for the proposition that the pending congressional enactment restricts this Court's discretion to grant or deny the preliminary injunction. However, the issue in *Black United Fund* was "the effect of a change of law which occurs after the entry of an order in the trial court but before appellate review." 763 F.2d at 160. Thus, while *Black United Fund* does stand for the proposition that enactment of the bill would moot any injunctive relief granted by this Court, it does not indicate that the Court should refrain from acting due to the pending legislation.

2) *Irreparable Harm*

Plaintiffs have cited authorities stating that constitutional violations in general, and dormant Commerce Clause violations in particular, constitute irreparable injury warranting injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 440 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (1973); *Allen v. Minnesota*, 867 F.Supp. 853, 859 (D.Minn.1994) (violation of Commerce and Contracts Clause constitutes irreparable harm); *Citicorp Servs., Inc. v. Gillespie*, 712 F.Supp. 749, 753-54 (N.D.Cal.1989) (Commerce Clause violation "give[s] rise to a presumption of irreparable harm"); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F.Supp. 853 (S.D.Ind.1990) (waste flow regulation which violates Commerce Clause causes irreparable injury regardless of showing of economic harm); *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F.Supp. 848, 854 (S.D.N.Y.1991) (local waste flow regulation that violates Commerce Clause "unquestionably constitutes irreparable injury."). Defendants, on the other hand, argue that unlike "personal" constitutional rights such as the First Amendment freedoms at issue in *Elrod v. Burns*, violations of "structural" constitutional rights such as the dormant Commerce Clause do not constitute *per se* irreparable harm. *See American Petroleum Inst. v. Jorling*, 710 F.Supp. 421, 431 (N.D.N.Y.1989); *Norfolk Southern Corp. v. Oberly*, 594 F.Supp. 514, 522 (D.Del.1984); *Grand Central Sanitation, Inc. v. City of Bethlehem*, No. 94-5928, mem. op. at 4-5, 1994 WL 613674 (E.D.Pa. Nov. 2, 1994).

The proper course lies between those charted by the respective parties. The Court holds that a violation of rights under the dormant Commerce Clause constitutes the "irreparable harm" necessary for a plaintiff to avoid denial of a preliminary injunction on this ground only. In a case such as this, however, where the Court must carefully weigh the moving party's likelihood of success on the merits and degree of irreparable harm against the irreparable harm that preliminary relief may cause to the opposing parties and the public, the violation of dormant Commerce Clause rights unaccompanied by other irreparable harm does not weigh heavily on the moving party's side of the scale. *See Constructors Ass'n of W. Penna. v. Kreps*, 573 F.2d 811, 820 n. 33 (3d Cir.1978) ("unlike First Amendment rights whose deprivation even from minimal periods of time constitutes irreparable injury [citing *Elrod*], a denial of equal protection rights may be more or less serious depending on the other injuries which accompany such deprivation."). *See also C & A Carbone*, 770 F.Supp. at 854 (finding irreparable injury in violation of dormant Commerce Clause rights along with economic harm that would be impossible to measure); *Government Suppliers*, 734 F.Supp. at 864 (same).

Atlantic Coast argues that in addition to the deprivation of its constitutional rights, it will also be forced out of business if the New Jersey waste flow regulations remain in force. This circuit has recognized that the destruction of a business may constitute irreparable harm warranting injunctive relief. *See Instant Air Freight*, 882 F.2d at 802. Atlantic Coast has shown that it is losing money, and doing so more quickly than it was when it accepted New Jersey waste. Nonetheless, this testimony

does not show that Atlantic Coast will go out of business if it is not granted relief *pendente lite*. If anything, this proposition is contradicted by Sheehan's statement that United Waste would stop supporting Atlantic Coast *if* the waste flow regulations were upheld. This statement implies that United Waste *will* continue to support Atlantic Coast pending a final resolution of this case. Therefore, the Court finds that Atlantic Coast has not made the necessary clear showing that denial of the preliminary injunction will force it out of business. *See id.* at 801-03.

Nonetheless, Atlantic Coast has suffered a high degree of monetary damage over an extended period of time from a waste flow regulation that, in light of the Third Circuit's decision and the current state of the record, is likely to be unconstitutional. Furthermore, this damage was inflicted by the State of New Jersey and its agencies, all of which are immune from money damages in this Court under the Eleventh Amendment. Where the Eleventh Amendment bars recovery of monetary damages from state entities, legal remedies are inadequate and the plaintiff has shown the irreparable harm necessary for injunctive relief. *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir.1991), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992). The Court finds that Atlantic Coast has suffered irreparable harm in the money damages it has suffered that it cannot recover from the state entities.[6]

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[6] Atlantic Coast has asserted that it may recover money damages from the county authorities. While the county authorities do not enjoy Eleventh Amendment immunity, whether they may be held liable in damages for their

3) *Harm to Defendants and the Public*

Defendants have shown that enjoining the waste flow regulations may reduce the value or cause default of the county authorities' publicly issued bonds, cause monetary damage to entities such as CCERA that own waste disposal facilities within the waste flow regulation scheme, cause administrative inconvenience for the state, and potentially undermine the goals of New Jersey's comprehensive waste flow plan. They also argue that the current scheme came about as a solution to years of difficulty in waste management in New Jersey, that the scheme was initially given approval by courts such as the Third Circuit in *J. Filiberto,* and that the program has largely been successful. Furthermore, disturbing the highly intertwined network of waste haulers, transfer stations, and disposal facilities (some of which are financed by tax-exempt bonds) created by the waste flow regulations would result in the disruption of not only the expectations but also the contractual rights and obligations of many participants in district plans who are not parties to this litigation, including purchasers of municipal bonds and any entities or institutions having credit enhancement obligations on that debt. Finally, New Jersey is not currently prepared to handle its solid waste

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participation in a mandatory state program is an open and difficult question. *See, e.g.,* 1 M. Schwartz & J. Kirklin, *Section 1983 Litigation* § 7.7 at 360-62 (1991). While the Court need not resolve the issue at this time, the likelihood that Atlantic Coast will be unable to recover damages from any defendant makes its harm irreparable.

flow stream without waste flow regulations, and disbanding the regulations may present significant environmental concerns.

However, defendants have not shown that the narrow relief sought by Atlantic Coast will cause this damage. Atlantic Coast processes only C & D waste, which the waste flow regulations classify as type 13 waste. While type 13 waste makes up approximately 20% of New Jersey's solid waste, it is defined as almost all "bulky" waste, including:

> Large items of waste material, such as, appliances, furniture, whole trees, branches, tree trunks and stumps. Also included are waste building materials and rubble resulting from construction, remodeling, repair and demolition operations on houses, commercial buildings, pavements and other structures. Discarded automobiles, trucks and trailers and large vehicle parts, and tires are included under this category.

N.J.A.C. 7:26-2.13(g)(iii).

While defendants have shown that enjoining a large segment of the waste flow regulations will cause them harm, and that type 13 waste makes up 20% of New Jersey's solid waste stream, the current record shows neither the portion of the 20% that is made up of the type of C & D waste that Atlantic Coast processes nor the effect that an injunction limited to this material would have on defendants and the public. In its previous opinion, the Court found that Atlantic Coast's permit from the Pennsylvania Department of Environmental Resources

("PaDER") allowed it to process waste including "uncontaminated rock, uncontaminated ferrous metals, wood, recyclables[,] uncontaminated soil, and non-marketable construction and demolition materials." (Sept. 8, 1993, Tr. at 14.) There is no evidence in the record from which the Court can adduce the extent to which the 20% of waste generally classified as type 13 waste is made up of the C & D waste specified in Atlantic Coast's permit.

In the absence of a showing that the relief requested by Atlantic Coast will dismantle a significant portion of the existing waste flow scheme, defendants' warnings about the harm that preliminary relief will cause them are unconvincing. Although defendants predict a significant disruption of revenues, significant administrative burdens, and a significant increase in the regulation of waste heading out of state, the current record simply does not allow the Court to quantify the burdens which would be imposed by an injunction generally affecting waste of the type hauled by Atlantic Coast.[7]

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[7] The Court recognizes that a party seeking a preliminary injunction bears the burden of showing that the irreparable harm it will suffer outweighs both the irreparable harm that the defendants will incur if the injunction is granted as well as the harm that the public will suffer as a result of the injunction. *AT & T*, 42 F.3d at 1427. However, defendants in this case have not met even the minimal burden of producing evidence showing the degree to which the proposed injunction would harm them, information that is uniquely within defendants' control. Because the current record does not allow the Court to find that defendants will suffer significant irreparable harm as a result of the proposed injunction, the Court finds that Atlantic Coast has met its burden of proving that the irreparable harm it will suffer outweighs any that defendants might incur.

Atlantic Coast's proposed injunction will affect less than 20% of the waste generated in New Jersey, and therefore will not frustrate the goals of programs such as the SWMA. The injunction will affect only those involved with C & D waste, and will not cause widespread disruption of New Jersey solid waste industry. C & D waste is also relatively clean, and does not present significant environmental concerns.[8] Indeed, the only significant impact on others that the Court perceives from granting this relief is requiring disposal facilities in New Jersey to compete with out of state facilities for the disposal of C & D waste, an obligation that is mandated by the Supreme Court's interpretation of the dormant Commerce Clause.

4) *Remedy*

Having found that all four factors favor Atlantic Coast, the Court concludes that Atlantic Coast is entitled to some type of relief. However, the Third Circuit specifically noted that it would "leave it to the discretion of the district court in the first instance . . . the issue of the appropriate form of relief if relief is to be granted." 48 F.3d at 718 n. 21. The simplest option would be for the Court to suspend the waste flow regulations with respect to C & D waste insofar as they prevent out of state

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[8] At oral argument, counsel for the county authorities pointed out that demolition waste resulting from the destruction of older buildings may contain asbestos. Once again, however, the Court has been provided with no proof of what percentage of C & D waste contains hazardous materials or whether Atlantic Coast processes waste that contains such materials.

facilities such as Atlantic Coast from accepting New Jersey waste and disposing of such waste at out of state facilities. New Jersey maintains nondiscriminatory regulations governing both disposal facilities and transfer stations. *See N.J.A.C.* 7:26-2 (disposal) *and* 7:26-2B (transfer stations). The Court could simply suspend the operation of the waste flow regulations with respect to C & D waste and allow any industry members, both within and outside the state, to accept such waste so long as they act in accordance with nondiscriminatory New Jersey regulations regarding the processing and disposal of such waste.

Both the state of the current record and important principles of comity counsel against this simplistic approach. While the Court has found that defendants will not suffer significant irreparable harm as a result of the envisioned injunction, it has done so more out of a lack of information than out of a firm conviction in the accuracy of this statement. For instance, at oral argument, counsel for the county authorities painted a grim picture of what would happen to the county authorities and their outstanding debt obligations if even a small section of the current waste flow regulations were disrupted. The county authorities are public entities that are required to operate at a balanced budget, and their budgets have been calculated on the basis of the revenue from the waste flow regulations. Also, the county authorities may not have access to cash except for their bond reserves, the depletion of which may result in default on the bonds. If even a small portion of the waste flow regulations were disturbed, the county authorities would lose revenues either through loss of business or reduced competitive

rates, forcing them to dip into bond reserves. As the reserves neared depletion, the county authorities would be forced to raise their rates to make up for the deficit, causing further lost business to out of state facilities. This downward spiral could eventually result in a default on the multi-millions in outstanding bonds issued by the county authorities.

This scenario has neither been proven on the present state of the record nor does the Court believe that it is certain to result. For example, the county authorities could make up on lost revenues on C & D waste through marginal increases in the tipping fees on non-C & D waste that would remain within the purview of the waste flow regulations. Nonetheless, the Court is mindful that the parties may not have focused on this issue in the current submissions, because they were not aware of what type of remedy the Court envisioned. Therefore, the Court believes that it must consider further information on these issues before it enforces an injunctive scheme that could have possible deleterious effects on both defendants and the public.

Even if convinced that the proposed remedy would not harm defendants and the public, this Court is not the proper institution to develop solutions to New Jersey's waste flow problems. As the Supreme Court has stated, judges "lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions" in solving these problems. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41, 93 S.Ct. 1278, 1301, 36 L.Ed.2d 16 (1973). Furthermore, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local

government institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51, 110 S.Ct. 1651, 1663, 109 L.Ed.2d 31 (1990). As the Court stated in *Jenkins*, "[a]uthorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems . . . upon those who themselves created the problems." *Id. See also Lemon v. Kurtzman*, 411 U.S. 192, 200-01, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973); *Robinson v. Cahill*, 62 N.J. 473, 520-21, 303 A.2d 273 (1973), *cert. denied*, 423 U.S. 913, 96 S.Ct. 217, 46 L.Ed.2d 141 (1975).

Therefore, the Court will grant Atlantic Coast relief conditioned upon the Court's consideration of further input from the parties. The Court shall give the state sixty days to submit a proposed alternative, nondiscriminatory plan to the current waste flow regulations governing the flow of the type of waste within Atlantic Coast's PaDER permit, along with a study of the possible impact of the proposed system on the state and the public. Thirty days thereafter the remaining defendants may submit a study of the possible impact of the proposed alternative regime on them. Thirty days after that Atlantic Coast may submit its objections, if any, to the state's proposed plan, and any arguments in opposition to the defendants' impact studies. The Court will then consider these submissions and fashion appropriate relief.[9]

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[9] The county authorities have argued that the Court should require Atlantic Coast to post a substantial injunctive bond. *See* Fed.R.Civ.P. 65(c); *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir.1988). The Court will address this issue when it fashions relief.

The Court anticipates two objections from the parties that may be dealt with immediately. First, Atlantic Coast may argue that the state is unlikely to propose a feasible nondiscriminatory alternative to the current scheme. As the Third Circuit observed, the state has apparently "vowed not to abandon its present system until compelled to do so. . . . " 48 F.3d at 718. Therefore, this Court's order could become a self-fulfilling prophecy: the state may propose an alternative regime that would be so detrimental to defendants and the public that the Court could not approve it. However, the Court believes that the state will to the best of its ability live up to its duty to comply with the order of this Court, and that if it does not, scrutiny of the state's proposed plan and the impact thereof by Atlantic Coast's counsel and the Court will allow the Court to implement an effective and feasible remedy.

Second, the state has taken the position that due to the interconnected nature of the statutes and regulations making up the waste flow regulations, it cannot effectively change a portion of the regulations without effectively dismantling the entire system. However, the Court notes that the waste flow regulations specifically provide that in an "emergency condition," the Department of Environment Protection and Energy may order the redirection of solid waste. *N.J.A.C.* 7:26-6.7. Certainly a court injunction would constitute such an emergency condition. Therefore, the state has the ability to promulgate emergency regulations that both fulfill the Court's order and that will last until the Court issues a final determination on the merits of the case.

B. *The Association Plaintiffs*

1) *Likelihood of Success on the Merits*

The members of the NSWMA and the WMANJ engage in activities similar to those engaged in by Atlantic Coast, and therefore are equally likely to succeed on the merits of their claim. Defendants do not seriously contest this proposition, but instead argue that the association plaintiffs lack standing. An association has standing to sue if (1) its members would have standing to sue in their own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the actual participation of the individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

Defendants correctly point out that WMANJ has submitted no evidence regarding its membership, and that the affidavit of Edward Repa, the Director of Environmental Programs for NSWMA, does not name any of its alleged 1,200 members, 130 of which are allegedly within New Jersey, and does not provide a statistical breakdown showing the types or volume of business actually transacted in this state. While the association plaintiffs have failed to provide the Court with this relatively simple and necessary information, it seems clear that WMANJ and NSWMA members from both within and outside would have standing to challenge the waste flow regulations, that the instant suit may further the purposes of the organizations, and that the broad-based injunctive relief sought by the association plaintiffs does not require the participation of any individual member. Indeed, NSWMA

has been allowed to participate in similar cases throughout the country. *See, e.g., National Solid Waste Management Ass'n v. Voinovich*, 763 F.Supp. 244 (S.D.Ohio 1991), *rev'd on other grounds*, 959 F.2d 590 (6th Cir.1992). Therefore, the Court finds that the association plaintiffs have shown a likelihood of success on the merits for the purposes of this motion. Defendants may bring any further challenges to the association plaintiffs' standing by formal motion.

2) *Irreparable Harm*

The failure of the association plaintiffs to supply the Court with information regarding the financial impact of the New Jersey waste flow regulations on its membership is damaging to their claim of irreparable harm. Although logic might dictate that members would gain revenues and save expenses if not excluded from New Jersey or exposed to the tipping fees associated with the waste flow regulations, it may also be that some of its New Jersey members actually benefit from the current system and would be hurt by its demise. The Court has before it absolutely no evidence regarding the extent of damages caused by the waste flow regulations. Therefore, even if the members cannot recover these damages from the state, they have made no showing as to what degree their damages are "irreparable."

As discussed above, the association plaintiffs have shown "irreparable harm" in that their rights under the dormant Commerce Clause have been violated. Nonetheless, because they have wholly failed to quantify the degree of economic harm they have suffered, the association plaintiffs have made only the most minimal showing

of irreparable harm necessary to prevent denial of their request for preliminary injunctive relief.

3) *Harm to the Defendants*

As a prerequisite to injunctive relief, the moving party must show that the irreparable harm caused to it by a lack of relief *pendente lite* will outweigh the irreparable harm caused to defendants if such relief is granted. *AT & T*, 42 F.3d at 1427. Because the members of the association plaintiffs deal in all types of solid waste, the relief they seek will require the wholesale suspension of the New Jersey waste flow regulations. Even on a *pendente lite* basis, this could cause a decrease in value and possible default on the county authorities' revenue bonds and the environmental hazards and logistical nightmares envisioned by the state. Where the moving parties' sole showing of irreparable harm consists of a bare violation of rights under the dormant Commerce Clause, a right that does not maintain such an esteemed position in the pantheon of rights as the First Amendment, *see Constructors Association*, 573 F.2d at 820 n. 33, this showing of harm to defendants in itself defeats the association plaintiffs' request for preliminary relief.

4) *Harm to the Public*

Although the Court's decision on the previous issue could dispose of this motion, the most compelling reason for denying the association plaintiffs' motion is the degree of harm that the requested relief will cause to the

public.[10] As discussed, the association plaintiffs' request for relief would destroy the entire waste flow regulation scheme on a *pendente lite* basis. While the association plaintiffs argue that this result would benefit the public because it would open New Jersey to outside competition and lower prices in the solid waste disposal industry, the more likely result would be the destruction of a highly complex and integrated waste disposal system and the concomitant destruction of the expectations and economic rights of participants in that system, which has been in place and upheld by the courts for years.

Indeed, perhaps the most disturbing aspect of the association plaintiffs' broad-based request for preliminary relief is that it would upset, rather than maintain, the long-established status quo. The most compelling reason to grant preliminary injunctive relief is to maintain the status quo until a final decision on the merits can be rendered. *Acierno*, 40 F.3d at 647. This injunction would destroy, rather than maintain, the status quo, and injunctive relief is therefore inappropriate in light of the degree to which the irreparable harm currently caused to these plaintiffs is outweighed by the degree of irreparable harm that the injunction could cause defendants and the public.

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[10] In *AT & T*, the Third Circuit noted that where a moving party has shown both a likelihood of success on the merits and irreparable injury, the public interest will "almost always" favor the grant of injunctive relief. 42 F.3d at 1427 n. 2. However, as will be explained, the extraordinary degree of public harm that could be caused here takes the case outside that normal rule. Indeed, the *AT & T* court specifically noted that despite this general rule, a district court "should award preliminary injunctive relief only upon weighing all four factors." *Id.*

Furthermore, preliminary injunctive relief suspending the entire waste flow scheme would not only disrupt the status quo, but would also give the association plaintiffs all the relief they seek in this case. Courts have long held that preliminary relief should not give the moving party essentially all the relief it seeks on the merits. *See, e.g., Dorfmann v. Boozer,* 414 F.2d 1168, 1173 n. 13 (D.C.Cir.1969). This maxim is especially applicable here. In light of the Third Circuit's holding in *Atlantic Coast,* defendants will be required to meet the "onerous" burden of proving that no feasible nondiscriminatory alternatives exist if the current waste flow regulations are to survive. 48 F.3d at 717-18. If the Court granted *pendente lite* relief now on its perception that defendants are not likely to make this showing, and defendants ultimately did make such a showing, the Court would have enjoined a comprehensive waste flow scheme to which no reasonable alternatives exist. *See Ortho Pharmaceutical Corp. v. Amgen, Inc.,* 882 F.2d 806, 813-14 (3d Cir.1989) (" 'judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to be unjustified.' ") (quoting 11 Wright & Miller, *Federal Practice & Procedure* § 2947 at 424). Instead of taking such a brash step at this point in the proceedings, the Court will deny the association plaintiffs' request for preliminary relief and give defendants the opportunity to show at a full hearing on the merits that no feasible alternatives exist.

C. *The Municipal Plaintiffs*

1) *Likelihood of Success on the Merits*

While the underlying merits of the claims by the municipal plaintiffs does not differ significantly from the claims brought by Atlantic Coast and the association plaintiffs, the municipal plaintiffs are unlikely to succeed on their claims because they cannot assert constitutional rights against the state or the county authorities. "Political subdivisions generally are held to lack constitutional rights against the creating state." 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3531.11 at 32. This rule applies to claims by municipalities not only against the state, but also against state agencies and other municipal bodies created by the state. *Id.* at n. 53-54.

The Third Circuit has recently recognized this rule, although with the lukewarm endorsement that it is "waning with time." *Amato v. Wilentz*, 952 F.2d 742, 754-55 (3d Cir.1991). Nonetheless, the Court believes that this rule survives under the circumstances presented by this case. The case most often cited for the proposition that municipalities may sue states for constitutional violations is *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). *See Amato*, 952 F.2d at 755 (citing *Rogers*); *Allegheny County Sanitary Auth. v. United States Envtl. Protection Auth.*, 732 F.2d 1167, 1173 n. 3 (3d Cir.1984) (same). In *Rogers*, a municipal school district sued state educational authorities challenging a state policy that required school districts to participate in an otherwise voluntary federal breakfast program. 588 F.2d at 1059. In allowing the municipality to proceed, the

Fifth Circuit held that the question of whether a municipality may sue another state entity was not one of standing *per se*, but a "substantive interpretation[ ] of the constitutional provisions involved." *Id.* at 1068. In light of this, the court concluded that the municipality could assert a claim that the congressional enactment limited the state's power to determine what entity could choose whether to participate in the breakfast program. *Id.* at 1070-71.

While the Court agrees with the holding in *Rogers*, it disagrees with the municipal plaintiffs' assertion that the case applies here. As Wright and Miller recognize, *Rogers* is most appropriately interpreted as standing for the proposition that municipalities may bring challenges under federal law to state statutes that regulate the relationship between the state and the municipality. 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3531.11 at 33 n. 55. In other words, municipalities may assert claims against the creating state under the Supremacy Clause, but not under other substantive constitutional guarantees.

Third Circuit case law supports this interpretation of *Rogers*. Although *Amato* did not wholeheartedly endorse the rule that municipalities cannot assert constitutional claims against the state, it did note that it "may remain the law of the land." 952 F.2d at 755. Furthermore, in *Allegheny County*, a case cited favorably by the municipal plaintiffs, the court cited *Rogers* for the proposition that a municipality could sue the creating state in federal court under a federal statute. 732 F.2d at 1173 n. 3. However, the circuit also noted that the district court had properly dismissed the municipality's constitutional claims against

the state. *Id.* at n. 2. Finally, a district court within this circuit has recently held that a municipality cannot assert a dormant Commerce Clause claim against its creating state or other municipal entities. *School Dist. of Phila. v. Pennsylvania Milk Mktg. Bd.*, 877 F.Supp. 245, 250 (E.D.Pa.1995). Therefore, the law in this circuit precludes the municipal plaintiffs from asserting their constitutional claims against both the state and the county authorities.[11]

Two of the municipalities have proceeded in the name of their mayor in his official capacities rather than in the names of the municipalities themselves. The Supreme Court has held that where a state statute leaves municipal officials a choice between violating the United States Constitution or taking actions that are "likely to bring their expulsion," they have standing to challenge the constitutionality of state law. *Board of Educ. v. Allen*, 392 U.S. 236, 241 n. 5, 88 S.Ct. 1923, 1925 n. 5, 20 L.Ed.2d 1060 (1968). Here, however, the mayors do not argue that

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[11] The municipal plaintiffs have also argued that they may bring these claims because New Jersey statutes grant municipalities the power to sue and be sued. *See N.J.S.A.* 40A:60-1(b) (boroughs), 40A:61-1(d) (cities), 40A:62-1(c) (towns), *and* 40A:63-1(c) (townships). While courts have considered the empowering statute in deciding whether a municipality may sue another state-created entity under federal or state statutory law, *see Allegheny County*, 732 F.2d at 1173 n. 3; *City of East Orange v. Palmer*, 47 N.J. 307, 220 A.2d 679 (1966), a state statute that authorizes municipalities to sue and be sued cannot give those municipalities a right to sue for the violation of constitutional protections that they do not enjoy vis-a-vis the creating state.

the state requires them to enforce the waste flow regulations, but that it requires them to participate in the system. In other words, the mayors do not allege that state law requires them to violate the constitutional rights of others, as it did in *Allen*, but that the rights of their towns are violated by state law, rights that the Court has already found do not exist. Under these circumstances, the claims of the mayors in their official capacities must fail for the same reasons as those of the municipalities themselves.

2) *Other Factors*

Because the Court has found that the municipal plaintiffs cannot assert the claims at issue here, they will be dismissed from the remainder of this case for failure to state a claim. *See Reich v. Beharry*, 883 F.2d 239, 240 n. 1 (3d Cir.1989) (affirming *sua sponte* dismissal for failure to state a claim). However, for record the Court notes that the municipal plaintiffs have failed to meet their burden on the remaining factors governing preliminary relief for primarily the same reasons as the association plaintiffs. To the extent that the municipalities allege that the waste flow regulations have caused them irreparable harm by forcing them to pay more for waste disposal, this claim is extremely speculative. While the municipal plaintiffs have shown that at this moment they could obtain solid waste disposal services at a lower rate than that at which they currently receive them, they have not shown that over the long term, state and county taxes, decreasing landfill capacity, or other contingencies would not bring the cost of municipal waste disposal to current levels or higher. Furthermore, type 10 municipal waste makes up

approximately 75% of the solid waste generated in New Jersey, and the equities of harm to the defendants and the public weigh against the grant of the injunction for the same reasons as discussed in conjunction with the association plaintiffs.

CONCLUSION

Atlantic Coast's motion for preliminary injunctive relief will be conditionally granted, conditioned upon the Court's consideration of an alternative plan to be submitted by the state of New Jersey, a submission by defendants regarding the impact this plan would have on them, and Atlantic Coast's response to these submissions. Because the possible irreparable harm to defendants and the public from the broad injunctive relief requested by the association plaintiffs outweighs these plaintiffs' showing of likelihood of success on the merits and irreparable harm, their motion for preliminary relief will be denied. Because the municipal plaintiffs lack a cause of action against defendants herein, their motion for preliminary relief will be denied and they will be dismissed from the case.

APPENDIX H

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al., Plaintiffs,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, et al., Defendants.

Civ. A. Nos. 93-2669 (JEI), 94-3244 (JEI).

United States District Court,
D. New Jersey.

Nov. 28, 1995.

In action asserting commerce clause challenge to New Jersey flow control regulations of construction and demolition (C&D) waste, the District Court, Irenas, J., held that preliminary injunction would be granted to restrain enforcement of flow control regulations in accordance with alternative regulatory plan.

Ordered accordingly.

Mesirov Gelman Jaffe Cramer & Jamieson by Mark R. Rosen, Haddonfield, NJ, for plaintiff Atlantic Coast Demolition & Recycling, Inc.

Steptoe & Johnson by William T. Hassler, Washington, DC, for plaintiffs C & A Carbone, National Solid Waste Management Association, Waste Management Association of New Jersey.

James J. Ciancia, Acting Attorney General of New Jersey by Gail M. Lambert, Deputy Attorney General, Stefanie A. Brand, Deputy Attorney General, Department

of Law and Public Safety, Division of Law, Newark, NJ, for defendant Robert Shinn, New Jersey Department of Environmental Protection.

Murshell J. Bland, County Counsel by Barbara H. Parker, Assistant County Counsel, County of Bergen, Hackensack, NJ, for defendants Bergen County Department of Health Services, William P. Schuber and Mark Guarino.

DeCotiis, Fitzpatrick & Gluck by J.S. Lee Cohen, Hackensack, NJ, for Intervenor-Defendants Hudson County Improvement Authority, Mercer County Improvement Authority, Essex County Utilities Authority, and Passaic County Utilities Authority.

Wolff & Samson, P.C. by David Samson, Roseland, NJ, for Intervenor-Defendant Camden County Energy Recovery Associates, L.P.

Sinisi, Van Dam & Sproviero by Stephen P. Sinisi, Paramus, NJ, for defendant Bergen County Utilities Authority.

Higgins, Slachetka & Long by Joseph J. Slachetka, Laurel Springs, NJ, for defendant Cape May County Municipal Utilities Authority.

IRENAS, District Judge:

The Court finds that the defendants have not established that a preliminary injunction would cause irreparable harm either to themselves or to the public if an alternative regulatory scheme is implemented. A preliminary injunction will be granted to restrain enforcement of the current flow control regulations of construction and demolition ("C & D") materials in accordance with the

alternative regulatory plan ("Plan") submitted by the New Jersey Department of Environmental Protection ("NJDEP" or "the State") on August 8, 1995. The Court interprets the Plan as eliminating flow control of all mixed loads of C & D waste so that in-state interests are not unfairly injured, accepts the Plan as being in compliance with the Court's Opinion and Order of June 9, 1995, and grants the State sixty days to implement the Plan with appropriate regulatory action. If no regulations are in place at that time, haulers of C & D waste will be permitted to (i) take mixed loads of C & D waste to any properly licensed recycling facility, whether in New Jersey or elsewhere, and (ii) dispose of the unrecycled residue at any lawfully operated site, whether in New Jersey or elsewhere.

I. PROCEDURAL HISTORY[1]

On June 6, 1995, this Court held a hearing in regard to plaintiffs' request for a preliminary injunction against flow control of construction and demolition waste in New Jersey. In its Order of June 9, 1995, the Court granted an injunction conditional upon further submissions by the defendants regarding potential alternatives to the current regulations and the possibility of serious irreparable harm to the defendants or the public because of the injunction.

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[1] For the complete procedural history and finding of facts, refer to this Court's Opinion of June 9, 1995, conditionally granting a preliminary injunction, and to its oral Opinion rendered September 8, 1993.

The State submitted its Plan on August 8, 1995. Co-defendants Camden County Energy Recovery Associates ("CCERA"), Bergen County Utilities Authority ("BCUA"),[2] and Cape May County Municipal Utilities Authority ("CMCMUA") responded to the Plan on September 8, 1995, as did defendants/intervenors Essex County Utilities Authority ("ECUA"), Hudson Improvement Authority ("HCIA"), Mercer County Improvement Authority ("MCIA"), and the Passaic County Utilities Authority ("PCUA"). Responses to all of these submissions were filed on October 13, 1995, by plaintiff Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") and the Carbone plaintiffs.[3] The State and the co-defendants replied to these responses on October 20, 1995.

The plaintiffs filed a motion for summary judgment on October 27, 1995, requesting that defendants be forestalled from presenting any evidence at the trial on the merits of the need for revenue generation as a justification for flow control. This motion was denied after oral argument on November 6, 1995. Oral argument regarding the preliminary injunction was also heard on November 6, 1995.

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[2] Bergen County, Bergen County Department of Health Service, William P. Schwar, and Mark Guarino joined in this response.

[3] The Carbone plaintiffs consist of C & A Carbone, the National Solid Waste Management Association, and the Waste Management Association of New Jersey.

II. STATEMENT OF FACTS

A. Flow Control of C & D Waste – The Current Regulatory Scheme

Over the last twenty-five years, New Jersey has developed a regulatory structure under which it monitors the flow of waste produced in the state. Twenty-two solid waste management districts were established in 1991, *N.J.S.A.* 13:1E-19, and each is responsible for developing and implementing a waste plan to treat and accommodate all solid waste generated within its boundaries. A key aspect of the district plans is waste flow control, through which the districts direct haulers to dispose of waste in designated facilities. If a district does not have sufficient capacity to dispose of or recycle its own waste, it can make arrangements with in-state or out-of-state facilities to handle all or a portion of the waste. New Jersey divides its waste into categories, one of which is Type 13 bulky materials. *N.J.A.C.* 7:26-2.13(g)(1)(iii) (1995). Approximately 64.3% of Type 13 bulky waste is C & D waste from the construction, demolition, or renovation of residential and commercial buildings.[4] *Plan*, at 11. C & D waste makes up about 23% of all solid waste material

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[4] NJDEP estimates that the C & D component of Type 13 bulky waste includes: treated wood, untreated wood scrap, tree stumps, tree parts and branches (25-34%); concrete asphalt, bricks, blocks and other masonry (24%); wallboard (15%); roofing materials (10%); corrugated cardboard and miscellaneous paper (8-18%); ferrous metal pipes and non-ferrous metal (7%); building insulation (4%); plastic scrap (2%); dirt (2%); carpets and padding (2%); glass (1%); and other miscellaneous materials in negligible amounts. *Plan*, at 5.

generated annually in New Jersey and 12% of the total waste disposed in the state. *Plan*, at 15.

There are essentially two categories of C & D waste: recyclables and non-recyclables. If a load of C & D waste has been sorted at the site of its creation, such that the load is composed only of C & D recyclables, it is not subject to waste flow control and it can be transported to any in-state or out-of-state facility. *N.J.A.C.* 7:26-1.1(a)(1) (1995).

Non-recyclable C & D waste must be disposed of at a district's designated facility in accordance with flow control regulations. If a C & D load has not been source separated, it is a mixed load[5] that contains both recyclable and non-recyclable waste. There are two types of C & D mixed loads: 1) those composed of waste from only one solid waste management district; and 2) those composed of waste from more than one district. These latter mixed loads of nonhazardous solid waste (Types 10, 13,

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[5] There appear to be two uses of "mixed" when referring to loads of waste. Prior to the November 6, 1995, proceedings, "mixed" was used in this litigation to refer to loads composed of both recyclable and non-recyclable materials. This was the definition of "mixed" used by the Third Circuit in its 1995 opinion. *Atlantic Coast Demo. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 707 (3d Cir.1995).

When the regulations memorializing the Pereira Policy were discussed in the New Jersey Register, "mixed" was used to refer to loads containing C & D waste that originated in more than one district. 24 N.J.R. 3286(c), 3287 (Sept. 21, 1992); 25 N.J.R. 4763(a), 4763 (Oct. 18, 1993). Gary Sondermeyer, an official at NJDEP, also employed this definition when discussing mixed loads in his recent deposition. *Sondermeyer Deposition*, at 11, 161.

23, 25 and 27), which the Court will refer to as multi-district loads, are subject to additional state regulations. *N.J.A.C.* 7:26-2B.9 and 26-6.9 (1995); *Sondermeyer Deposition*, at 162. Multi-district mixed loads are delivered to in-state materials recovery facilities ("MRF"s) or transfer stations for sorting of recyclables. The remaining waste is returned to an appropriate facility for disposal in accordance with state regulations.

There is some dispute as to what type of mixed load can be taken out of the state for processing of recyclables. The Pereira Memorandum of June 7, 1983, promulgated by an employee of NJDEP, was interpreted by the State as permitting both categories of mixed loads to be taken out of New Jersey for sorting of recyclables as long as the waste remaining after the sorting, an equivalent amount of waste, or an appropriate fee was returned to the district of origin. Some districts, however, interpreted the Pereira Policy as requiring that the facility doing the recycling be included in a district plan.[6] In 1992, regulations were promulgated to codify the Pereira Policy. *N.J.A.C.* 7:26-2B.9 and 26-6.9 (1995). Gary Sondermeyer, Assistant Director of the Division of Solid and Hazardous Waste of NJDEP, and a primary author of the Plan, now interprets these regulations as not authorizing out-of-state sorting of multi-district mixed loads. *Sondermeyer Deposition*, at 25-26. It appears to the Court that the

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[6] For a discussion of the various interpretations of the Pereira Policy, refer to the Court's Oral Opinion of September 8, 1993, at 38-39, in this case.

regulations memorializing the Pereira Policy do not prohibit out-of-state processing of mixed loads. The New Jersey Administrative Code states:

> **Transporting solid waste between solid waste districts and out-of-State**
>
> (a) Notwithstanding the designation of specific disposal facilities for ultimate disposal of certain waste streams, it shall not be a violation of *N.J.A.C.* 7:26-6 or any franchise approvals issued pursuant to N.J.S.A. 48:13A-5 [f]or solid waste generated in a district to be transported out of that district or for out-of-district waste to enter a solid waste district for the processing or recovery of materials provided the requirements of *N.J.A.C.* 7:26-2.11, 2.13, and 2B.9 are met.
>
> (b) Facilities designated by solid waste districts for the ultimate in-State disposal of solid waste shall accept out-of-district waste from transfer stations or materials recovery facilities provided the requirements of *N.J.A.C.* 7:26-2.13 are met.

N.J.A.C. 7:26-6.9 (1995). Regardless of how the current regulations are interpreted, plaintiffs seek, and will be granted, the right to take all mixed loads of C & D waste, including multi-district mixed loads, to any in-state or out-of-state recycling facility, and to dispose of the unrecyclable residue without regard to existing flow control regulations.

B. The State's Plan

Although the State submitted its Plan as required by the Court's Order of June 9, 1995, it continues to maintain, and the co-defendants concur, that the current flow control system is the only means of regulating the waste flow in New Jersey and that even the limited modification embodied in the Plan will seriously harm the public. *Plan*, at 1. Under the Plan, a transporter of mixed loads of C & D waste wishing to take the loads to out-of-state facilities would first go to the same facility to which it is directed for disposal of non-recyclables or transfer of loads under the current waste flow scheme. Rather than dump its load, the hauler would weigh in at a monitoring point,[7] and the facility would have the option to untarp the truck and examine the load, or to require the hauler to dump the load for a more thorough inspection. *Plan*, at 17; *Sondermeyer Deposition*, at 28. The hauler would not be charged a tipping fee or any kind of user fee, but would be required to submit one or more forms indicating the

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[7] In its Response to the Plan, the Cape May County Municipal Utilities Authority suggests that re-weighing of vehicles after tipping should be performed at the receiving facility, and the owner of the delivery vehicle should be required to insure that the empty weight is recorded and submitted in a timely fashion to the originating solid waste district. *CMCMUA Response to Plan*, at 16. CMCMUA later presented the Unsworn Declaration of George Marinakis, P.E., to suggest that the weight of waste loads could be determined using tare weights of vehicles. The State has not specified how weighing will occur, and the Court leaves this decision to the State's discretion, as discussed *infra*.

type of waste, the municipality from which it was generated, and the ultimate disposal location which the transporter intends to use. *Plan,* at 17. The forms would be used for record-keeping purposes and to ensure that transporters use the facility they designate. *Plan,* at 17. Reporting at transfer facilities has been found to be more accurate than information reported from haulers. *Sondermeyer Deposition,* at 141.

The State expects that the optional inspection would largely deter illegal diversion of the unaffected 88% of the State's waste. *Sondermeyer Deposition,* at 28. The Cape May County Municipal Utilities Authority suggests that at least 15% of waste delivery vehicles should be subjected to a random thorough inspection by requiring that the full load be deposited in a designated area, and that any load suspected of containing unauthorized waste could be subjected to a similar search. *CMCMUA Response to the Plan,* at 16.

C. Alternative Plans

The plaintiffs have submitted testimony describing other alternatives to waste flow control that could be used by a state or have been used by other local governments throughout the country. The Affidavit of Bruce J. Parker addresses plans employed by cities in Minnesota and Pennsylvania, while his deposition details nondiscriminatory proposals that could be employed by New Jersey. *See, e.g., Parker Deposition,* at 64-65. Attached to the Parker Affidavit is the Statement of Michael Shapiro, Director, Office of Solid Waste, U.S. Environmental Protection Agency, in which Mr. Shapiro concludes that flow

control is not required to meet environmental and waste management goals such as those of concern to New Jersey. Also attached is the Supplemental Certification of Philip Weinberg discussing Massachusetts' waste regulation scheme. The Court's role at this point is not to evaluate these alternative plans which may be available to the State, but to decide if the Plan promulgated by the State is an acceptable nondiscriminatory alternative to the current flow control of C & D waste.

D. Financing the State Mandated Plan

1. Cross-Subsidization of Tipping Fees

While the county defendants generally endorse the State's Plan as the most workable alternative to flow control, they disagree on how to finance it. The State suggests that the best financing alternative is to cross-subsidize the loss in C & D revenues caused by a decreased input of such waste by raising the tipping fee for other types of waste. *Plan,* at 15-16. It proposes that the counties submit petitions to establish tariff adjustments so that sufficient revenues are maintained to compensate for any losses of C & D debris. *Id.* Some counties may choose to minimize the subsidy by cutting operating expenses while others decide to make up the revenues in the rates of some but not other types of waste. The State describes two other options in its Plan (Options II and III), but does not recommend either one.

Camden County Energy Recovery Associates objects to this cross-subsidization and argues that it will place an unfair, disproportionate burden on generators of waste

that can be processed and may result in a greater decrease in waste brought to their facility as the costs increase and haulers seek alternative disposal sites. *CCERA Response to Plan,* at 4. CCERA also objects to the State's insistence on maintaining the utility system for solid waste disposal facilities and the requirement that the State approve all tariff changes. *Id.* at 5. With the increased need for competitive pricing that will accompany the elimination of C & D flow control, CCERA argues that it is infeasible to require State approval for disposal rates when that approval, at best, takes five months from submission of a proposal. *Id.* Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and the Passaic County Utilities (the "County Authorities") likewise contend that the traditional rate-making procedures are too cumbersome to permit counties to respond to market fluctuations. *County Authorities' Response to Plan,* at 3.

2. Other Financing Options

The co-defendants express concern that cross-subsidization is not the proper financing tool for the Plan. Instead, they suggest a variety of ways to compute a service fee that could be imposed on haulers of C & D waste. The County Authorities propose that each County/Solid Waste Management District calculate and impose a System Benefit Charge ("SBC") on each ton of waste generated in the County/District. *County Authorities' Response to Plan,* at 5. The SBC would represent the

allocable portion of the associated fixed costs of the relevant waste disposal system. These costs would include, but not be limited to, debt service, recycling costs, operating and administrative expenses, host community payments, and State imposed taxes. The SBC would be collected from haulers as they weighed in waste-laden vehicles at district-designated scale houses. Haulers would in turn build an established SBC fee into the rates charged to customers. A separate tipping fee would be charged to those that deposit C & D waste in-state. The County Authorities admit that this plan would likely require legislative amendment and rule-making.

The Bergen County Utilities Authority (BCUA) proposes the development and implementation of a bifurcated rate structure comprising:

> a) a solid waste tariff design for the diverse solid waste types subject to transportation and disposal services provided by BCUA through its transfer station system; b) a BCUA-implemented "user charge," enacted in accordance with N.J.S.A. 40:14B-22.1, to allocate the non-transportation and disposal components of BCUA's integrated Solid Waste System among the "users" who have, and continue to benefit from such programs and services – Bergen County's residents.

BCUA Response to Plan, at 9. To develop an equitable "user charge," BCUA would use statistical data from local building permit applications to allocate a fee on a municipality-by-municipality basis, and an assessed city could in turn determine how best to recoup the assessment, e.g., through incorporation in its tax base, or

through establishment of a surcharge on the issuance of building permits. *Id.* at 11.

The Cape May County Municipal Utilities Authority proposes that the lost revenues be recouped through the assessment of a county construction and demolition fee on all C & D waste delivered to its facilities either for the purpose of processing and disposal or for the purpose of inspection and weighing prior to out-of-state disposal. *CMCMUA Response to Plan,* at 17-18. The assessment would be based on the fixed cost associated with providing the services and the capacity for acceptance and disposal of in-district generated C & D waste. Companies that actually deposited their waste in-district would be charged an additional fee. CMCMUA contends that this would be more equitable than an increase in the county tax rate, which would unfairly assess charges to residential users, including those who only seasonally occupy their property.

III. DISCUSSION

A. Harm to the Public and to Defendants

The State has described the harms that may result to the public and the defendants if a preliminary injunction is granted. *Plan,* Section III. These harms, further elaborated upon by the co-defendants, include the impact on revenues to fund the regulatory scheme and the debt burden, environmental impacts, enforcement of waste flow regulations covering all types of waste in New Jersey, impact to existing recycling programs, and impact on solid waste planning. The Court must balance the harms

to plaintiffs against those likely to befall the defendants or the public if an injunction is granted and the Plan implemented. Given that only a small portion of New Jersey's waste is at issue, the harms discussed below can be adequately addressed by the State's Plan.

1. Impact on Revenues and Debt Burden

In its Plan, the State discusses public debt considerations, local budgetary restraints, county waste flow loss and the impact on revenue, and tariff equity concerns. *Plan*, at 44-56. The primary public harm that will result from the granting of a preliminary injunction appears to be the loss of revenues from C & D waste disposal and the threat to debt burdens undertaken in financing the facilities needed in the waste flow regulatory scheme.

Construction and demolition waste constitutes 12% of all waste disposed of in New Jersey. *Id.*, at 14. If its flow is no longer controlled by state regulation, the amount of C & D waste disposed of or recycled in New Jersey will likely decrease, but the decrease will not equal the total of all C & D waste. More likely only a portion of C & D waste will be transported out-of-state. The actual percentage lost and the actual impact on revenue will depend on what pricing adjustments can or will be made by New Jersey facilities to meet out-of-state competition. In fact, some in-state facilities may see an increase in revenues because their tipping fees for C & D waste are competitive with the fees charged at out-of-state facilities. *Sondermeyer Deposition*, at 49, 56-57.

By their very nature, state laws and regulations which violate the Commerce Clause impact the economic well-being of public or private entities, and their elimination has a negative financial impact on someone. There are always winners and losers when economic relationships are forcibly altered. To deny a preliminary injunction solely on the basis that it causes economic harm to the previously benefitted party might leave the Court unable to vindicate a constitutional right.

Any revenue shortfall from the decreased disposal of C & D waste can be recovered through other means. At the very least, it appears that waste management districts can change the rates charged for tipping C & D waste to make this type of in-state disposal more competitive so fewer haulers choose to transport C & D waste out of New Jersey. The districts can also change the rates charged for tipping other types of waste to increase their revenues. The possible loss of revenue can be adequately addressed in connection with the implementation of the Plan and does not constitute the type of harm which would preclude the Court's enforcement of a preliminary injunction against flow control of C & D waste transported out of New Jersey. In short, while the Court finds that granting a preliminary injunction dismantling the entire waste flow scheme would wreak havoc in New Jersey and cause substantial public and private harm, the cessation of flow control of C & D mixed loads will not cause undue harm to the defendants or the public.

2. Environmental Impacts

The State argues that the implementation of the Plan raises a number of environmental concerns, including: (i) loss of control of mandatory truck access routes to and from transfer and disposal facilities; (ii) potential for significant increases in traffic along New Jersey roads en route to more distant in-state disposal facilities (up to 575 truck trips daily over further distances); and (iii) potential increases in illegal disposal of waste. *Plan*, at 20.

The Carbone plaintiffs respond that little weight should be given to the State's arguments about truck routes, as many trucks already take waste out-of-state – these trucks likely will follow their established routes, and trucks travelling out for the first time can follow in their path. *Carbone Response to Plan*, at 13. In addition, the Carbone plaintiffs point out that New Jersey currently has no regulations governing the routes that must be taken by trucks hauling waste across the state. *Id.* at 14. Atlantic Coast details the State's practices regulating the transportation of waste and argues that the State generally has not demonstrated much concern for truck routes or volume. *Atlantic Coast Response to Plan*, at 14-17.

The Certification of Gary Sondermeyer, dated October 23, 1995, describes the ways in which truck routes in the State are monitored and explains that the State does not itself regulate these routes in most cases, but rather, leaves this task to the counties. In his deposition, Sondermeyer, Assistant Director of the Division of Solid and Hazardous Waste of NJDEP, and a primary author of the Plan, emphasizes that the State is concerned about the

unpredictability that may result if C & D waste is permitted to travel anywhere within the state and the inability of facilities to plan for the number of trucks that will arrive on any given day. *Sondermeyer Deposition*, at 37.

Adoption of the Plan does not increase the total volume of waste transported in New Jersey. *Id.* at 42. The State's estimate of 575 truck trips each day equals the number of trips occurring under the current system with established truck routes. *Id.* at 39. One-third of C & D waste currently is disposed of out-of-state. *Id.* at 43-44. While these out-of-state patterns may change in some parts of New Jersey, the existing degree of out-of-state traffic suggests that the Plan's impact on traffic flow will not be as significant as claimed by the State.

Truck routes for transportation of waste intra-county to transfer stations or MRFs already exist, and there is no apparent reason that these routes would not be applicable to mixed loads reporting for initial inspection and weighing as provided in the Plan. Nor is there any reason that the State or individual districts cannot adopt new mandatory truck routes for waste transporters using the State's thoroughfares, so long as these regulations do not discriminate against interstate commerce and are otherwise in conformity with applicable law.

3. Enforcement Concerns

The State expresses fear that permitting C & D waste to move in an open market with no ability for monitoring and surveillance will make overall waste flow enforcement for the balance of the waste stream exceedingly

difficult. *Plan,* at 26-29; *Brubaker Deposition,* at 14. While the totally unrestrained interstate flow of waste might create significant enforcement problems, the Plan's provision for weighing and inspecting mixed loads transported out-of-state should substantially alleviate these concerns.

The Court is somewhat befuddled by suggestions that its Opinion and Order of June 9, 1995, has already caused a noticeable decrease in the amount of C & D waste deposited in-state. In his direct testimony, Richard Scott Brubaker, Chief of the Bureau of Compliance and Enforcement, Division of Enforcement Field Operations of NJDEP and a primary author of the Plan, stated that Bergen County already appears to be losing C & D material because haulers are bypassing the system. Similarly, Frank Giordano, Executive Director of the Pollution Control Financial Authority of Camden County, stated in his deposition that Camden County saw a decrease in the waste coming into its facilities in the summer of 1995. *Certification of William E. Goydan, Deposition of Frank Giordano,* at 20-21.

If a decrease in C & D waste disposal has indeed occurred, it is probably due to illegal waste hauling. Such a violation of the law does not demonstrate public harm sufficient to counter the granting of an injunction, but it does buttress the State's argument that a crucial element of its Plan is the mandatory inspection and monitoring of all C & D loads destined for out-of-state disposal.

4. Impact on Existing Recycling Programs

One goal of New Jersey's waste flow control is to increase the level of recycling to 60% of the entire solid waste stream by December 31, 1995. *Plan*, at 30. The percentage of C & D waste recycled is high. In 1993, 75% of all C & D waste generated in New Jersey was recycled. *Plan*, at 15. Many counties have come close to achieving the overall recycling goal, and there is great fear that an injunction will impede this progress because companies may ship C & D waste out-of-state rather than recycle it in-state. *Sondermeyer Deposition*, at 178. In addition, without a guaranteed flow of materials to recycle, New Jersey's primarily private recycling industry may be adversely affected in terms of job creation and value added to the economy. *Id.* at 72-73, 178.

The current success of New Jersey's recycling efforts regarding C & D waste is a function of the artificially high price of disposal in the State. When it is cheaper for a hauler to recycle materials than to dump them in a landfill, the materials will be recycled. In the 1993 hearings in this matter, representatives of Atlantic Coast admitted that its profits do not come from recycling portions of mixed C & D loads, but from the ultimate disposal of the remaining 80-90% of material, which is solid waste. *See Atlantic Coast*, Oral Opinion, September 8, 1993, at 15.

There are other ways for New Jersey to achieve the same recycling result without discriminating against interstate commerce. For example, New Jersey could supplement its laws to require recycling or source separation of C & D materials created in-state or to provide other

financial incentives to those who do so voluntarily. *See*, Clean Communities and Recycling Act, P.L.1981, § 278 (codified at *N.J.S.A.* 13:1E-92 *et seq.*); New Jersey Statewide Mandatory Source Separation and Recycling Act, P.L.1987, § 102 (codified at *N.J.S.A.* 13:1E-99.11 *et seq.*). It is not necessarily improper for the State to consider that high disposal costs make such regulations unnecessary, provided that these high costs are not the result of an unconstitutional restraint on interstate commerce.

5. Impact on Solid Waste Planning

The State stresses that its goal of becoming self-sufficient in waste handling will be jeopardized by removing waste control of the C & D portion of the waste stream. Some landfills will be used up more quickly and not in accordance with long-term planning carried out by the State. *Sondermeyer Deposition*, 77-78. Other facilities may close due to under-utilization, leaving no environmentally sound option for disposal in an area. *Brubaker Deposition*, at 25. While there is certainly the potential for significant public harm if a waste disposal crisis again develops, the likelihood of such harm resulting from this preliminary injunction is not significant. These arguments may, however, become relevant at trial when the State attempts to prove that New Jersey's flow control regulations can withstand the strict scrutiny analysis directed by the Third Circuit. *Atlantic Coast*, 48 F.3d at 717-18.

B. The Mandated Plan

1. Scope of the Injunction

The plaintiffs are seeking an injunction against New Jersey's prohibition of the disposal of C & D waste out-of-state. However, the Court interprets the Plan as eliminating flow control of all C & D mixed loads generated in New Jersey. Any other interpretation would, paradoxically, force haulers to go out of the state to seek lower disposal fees, rather than availing themselves of competitive rates available in other New Jersey districts.[8] Allowing intrastate competition as well as interstate competition will likely have the result that more C & D waste will remain in-state, albeit not in its district of origination, and in-state facilities such as those in Burlington County may experience an increase in revenues because their tipping fee for C & D waste is competitive with out-of-state facilities. *Sondermeyer Deposition*, at 49, 56-57.

2. Elements of the Plan

The plaintiffs contend that inspections as required under the Plan unconstitutionally discriminate against interstate commerce. The Carbone plaintiffs argue that the local inspections could effectively cut off interstate shipments by unreasonably delaying trucks bound for out-of-state sites, while imposing no comparable burden

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[8] The Court expresses no opinion on whether a plan which exempted only out-of-state disposal of C & D waste from flow control would be subject to legal assault.

on trucks using local disposal facilities. *Carbone Response to Plan,* at 5-6. Atlantic Coast asserts that these inspections are overbroad and unnecessary, and has submitted the direct testimony and Unsworn Declaration of William Hargrove to illustrate the added time that is likely to result from the State's inspection requirement. The Court notes that the inspection requirement may actually benefit interstate haulers because they will now have a document from a designated facility which confirms that they are permitted to take an entire load out-of-state. Mr. William Hargrove testified that when his trucks attempted to take mixed loads of C & D waste to Pennsylvania for extraction of recyclables pursuant to *N.J.A.C.* 7:25-6.9, he was subject to enforcement action. While he appeared to attribute this to the States' or counties' reluctance to comply with their own regulations, a more benign explanation is the inability of an enforcement official to know what kind of waste is actually in a truck about to cross the Delaware. If Mr. Hargrove's trucks were subjected to the kind of inspection contemplated by the Plan, any driver would have in her possession sufficient documentation to satisfy a curious law enforcement officer.

The Court finds that the State has sufficient need for monitoring and accurate data collection to require inspection of all C & D waste haulers at designated district facilities before waste is delivered out-of-state.[9] The plaintiffs' argument that the inspection requirement will

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[9] The Court does not interpret the Plan to require initial weighing or inspection of haulers disposing of C & D waste in New Jersey.

be used to frustrate out-of-state waste disposal or recycling is premature. The Court would certainly take appropriate action if the State or individual districts implemented this injunction in a manner not designed to satisfy reasonable regulatory objectives but rather to frustrate the goal of the Court's orders.

Loads that are dumped in New Jersey without first being transported out-of-state face the ultimate inspection – operators at the disposal site and state enforcement officials can view exactly what is dumped when a truck tips its load. While an inspection scheme that required dumping of all out-of-state loads for analysis would be burdensome,[10] the Court finds that it is not unreasonable for the State to require a non-dumping inspection of all loads. In addition, the State may require the dumping of random loads for the purpose of spot-checks, or the dumping of a particular load if there is a reasonable suspicion about its contents.

Although plaintiffs' witness testified that dumping would be required on all loads if an accurate inspection and weighing occurred, *Barbiere Deposition*, at 49-50, 54, he also stated that roll-offs are easier to inspect than packer trucks, and that nine of ten waste loads arrive at a transfer station in a roll-off, *id.* at 102-03. Furthermore,

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[10] William Hargrove, owner of William Hargrove Demolition Company, Inc., testified on November 6, 1995, about the hazard of unbalanced loads. He stated that it is difficult and time-consuming to properly balance a load and that if all haulers were forced to unload and reload in-state for inspection prior to transporting waste out-of-state, haulers could not afford to take C & D waste out-of-state.

Richard Scott Brubaker, Chief of the NJDEP Bureau of Compliance and Enforcement, testified that such dumping would occur in only a small percentage of inspections. In addition, Mr. Brubaker stated that there is typically no back-up at transfer stations and that these stations make an effort not to waste time in processing haulers. While the State has not commented on the suggestion of Cape May County Municipal Utilities Authority that 15% of waste delivery vehicles be subjected to random, full-dumping inspections, the Court notes, without holding, that requiring 15% of all vehicles selected at random to dump their loads for inspection seems excessive in the absence of reason to suspect that the load contains illegal materials.

Plaintiffs' suggestion that New Jersey rely on forms completed by out-of-state facilities is insufficient to meet the State's enforcement concerns because NJDEP has no control over those facilities and no right to inspect them. *Brubaker Testimony,* November 6, 1995. NJDEP has attempted to make inspection arrangements with other states and has found that they do not share its interest in avid record-keeping and scrutiny of waste disposal activities. *Id.*

The Plan appears to contemplate the weighing of the fully loaded truck, since weighing just the waste would require the truck to be emptied and weighed a second time, and then reloaded. This would be a costly and time-consuming procedure. If the State is concerned about the accuracy of figures it receives from out-of-state facilities where the truck will be emptied, it may develop regulations in the next sixty days to monitor truck weight through a system other than dumping of all loads. For

example, the State may require that each hauler register the tare weight of its vehicles and containers with the State or county so that these records are on file with the designated inspection facilities and can be compared with full-load weighing to determine the amount of C & D waste being hauled out of New Jersey. *See Unsworn Declaration of George Marinakis, P.E.; Plaintiffs' Joint Response to Declaration of Marinakis.*[11]

Similarly, the State may develop regulations requiring that out-of-state haulers provide New Jersey with a receipt from the ultimate tipping destination that lists the truck's empty weight immediately after the load is dumped. The Court does not make any determinations as to what weighing system the State should employ, or that it must employ one, but rather suggests that there are means available to enable the State to gather reasonably accurate information on the quantity of C & D waste being transported out of the state.

3. Financing the Plan

There is significant disagreement among the co-defendants[12] as to the appropriate way to fund the Plan and to make up revenues lost by the cessation of flow control of C & D waste. What funding mechanisms are

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[11] During oral argument, it was suggested that haulers can modify trucks to change their tare weights. The risk that any such alterations would impair the State's legitimate need for information is minimal.

[12] *See supra*, Part II, Statement of Facts, for a discussion of the funding options proposed by the co-defendants.

permissible or whether the current rate-making structure can be suspended are matters to be decided by state authorities based on state law, and not by a federal district court. Several counties have suggested that haulers taking C & D waste out-of-state be required to pay a fee to cover the costs associated with providing the weighing and inspection services mandated by the Plan. Whether such a fee can be charged, who should charge it, and how it might be computed are matters, in the first instance, of New Jersey law. Whether such fees might constitute a Commerce Clause violation will not be decided by this Court in the abstract.

IV. BOND

When a federal court grants injunctive relief to a party, it must require that the party seeking this relief provide security for any damages that may be incurred by a party found to have been wrongly enjoined, Fed.R.Civ.P. 65(c), unless the action brought by the plaintiff complies with "certain narrowly drawn circumstances," *Temple University v. White*, 941 F.2d 201, 219 (3d Cir.1991). These circumstances include possible loss to the enjoined party and hardship to the injunction applicant, and they will rarely be found. *Id.; Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir.1988). The Court does not find that this case fits within the Third Circuit's narrow exception to the security requirement, and will thus require that plaintiffs post appropriate bonds.

The amount of a bond is within the discretion of the Court. *Frank's GMC*, 847 F.2d at 103. When setting the

amount, it is appropriate for a Court to consider both (i) the potential financial harm to defendants, *Alexander v. Primerica Holdings, Inc.*, 811 F.Supp. 1025, 1038-39 (D.N.J.1993) (bond of $7,733,514 required, equal to losses defendant may incur), and (ii) the fact that plaintiffs seek to vindicate a federal right or public interest, *see, e.g., Temple University*, 941 F.2d at 220 and 220 n. 28 (noting that a nominal bond would have sufficed in suit to enforce Medicaid rights); *Lee v. State*, 869 F.Supp. 1491, 1503 (D.Or.1994) (setting nominal bond of $1.00 in case challenging constitutionality of physician-assisted suicide law); *Lysaght v. New Jersey*, 837 F.Supp. 646, 654 (D.N.J.1993) (setting bond of $15,000 when First Amendment challenge raised against a state telemarketing law).

The first factor suggests that the bond be substantial since the defendants have asserted that they will suffer extensive damage under the preliminary injunction. On the other hand, the defendants' revenue losses can largely be recouped through cross-subsidization of disposal fees or the establishment of a fee for inspection and weighing of C & D loads. As plaintiffs have brought this action under the Commerce Clause and are seeking enforcement of a constitutional right, the Court finds it appropriate that plaintiffs each post an injunctive bond in the amount of $50,000.

V. CONCLUSION

We understand that under the Plan and existing regulations haulers of mixed loads of C & D waste, including multi-district loads, will be permitted to dispose of the

non-recyclables either out-of-state or in New Jersey without regard to flow control regulations. Before such mixed loads of C & D waste are taken out-of-state, they must be inspected and weighed in the district which would have governed its disposal under the waste flow control district plans.

The Court finds the Plan to be an acceptable non-discriminatory means of monitoring the processing and disposal of C & D waste generated in New Jersey which will not cause the public or the defendants irreparable harm. The State will have sixty days to implement the Plan with appropriate regulatory action. If no regulations are in place at that time, haulers of C & D waste will be permitted to (i) take mixed loads of C & D waste to any properly licensed recycling facility, whether in New Jersey or elsewhere, and (ii) dispose of the unrecycled residue at any lawfully operated site, whether in New Jersey or elsewhere.

APPENDIX I

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al., Plaintiffs,

v.

BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, et al., Defendants.

Civil Action Nos. 93-2669 (JEI), 94-3244 (JEI).

United States District Court, D. New Jersey.

July 15, 1996.

In action bringing dormant commerce clause challenges to New Jersey's waste flow regulations, the District Court, Irenas, J., held that New Jersey's waste flow control laws violated commerce clause, thus warranting an injunction against enforcement, though injunction would be stayed to allow time to devise nondiscriminatory alternative.

Ordered accordingly.

Mesirov Gelman Jaffe Cramer & Jamieson by Mark R. Rosen, Haddonfield, NJ, for Plaintiff Atlantic Coast Demolition & Recycling, Inc.

Steptoe & Johnson by William T. Hassler, Betty Jo Christian, Paul J. Ondrasik, Jr., F. Franklin Amanat, Washington, DC, for Plaintiffs C & A Carbone, Inc., National Solid Waste Management Association, Waste Management Association of New Jersey.

Peter Verniero, Attorney General of New Jersey by Gail M. Lambert, Deputy Attorney General, Stefanie A. Brand, Kevin A. Auerbacher, Deputy Attorneys General, Andrea M. Silkowitz, Assistant Att'y. Gen., of Counsel, Department of Law and Public Safety, Division of Law, Newark, NJ, for Defendant Robert Shinn, New Jersey Department of Environmental Protection.

Robert G. Millenky, Camden County Counsel, Camden, NJ, for Defendant Board of Chosen Freeholders of Camden County.

Murshell J. Bland, Bergen County Counsel by Barbara H. Parker, Assistant County Counsel, County of Bergen, Hackensack, NJ, for Defendant Bergen County Department of Health Services.

DeCotiis, Fitzpatrick & Gluck by J.S. Lee Cohen, Hackensack, NJ, for Intervenor-Defendants Hudson County Improvement Authority, Mercer County Improvement Authority, Essex County Utilities Authority, and Passaic County Utilities Authority.

Wolff & Samson, P.C. by Gage Andretta, David Samson, Roseland, NJ, for Intervenor-Defendant Camden County Energy Recovery Associates, L.P.

Sinisi, Van Dam, Sproviero & Sokolich by Stephen P. Sinisi, Scott G. Sproviero, Paramus, NJ, for Defendant Bergen County Utilities Authority.

Higgins, Slachetka & Long by Thomas S. Higgins, Joseph J. Slachetka, Laurel Springs, NJ, for Intervenor-Defendant Cape May County Municipal Utilities Authority.

OPINION

IRENAS, District Judge:

Plaintiffs have brought challenges under the dormant Commerce Clause[1] to portions of the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 to -207, the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 *et seq.*, and regulations promulgated thereunder, N.J.A.C. 7:26-1.1 *et seq.*, a group of statutes and regulations that the Court shall refer to collectively as the "waste flow regulations."[2] After granting plaintiff Atlantic Coast's motion for a preliminary injunction of waste flow control over construction and demolition ("C & D") waste and giving the parties an opportunity to further develop the record, the Court held a non-jury trial to consider the merits of the complaints filed by plaintiffs. Having reviewed the testimony submitted by all parties, the Court now holds that the defendants have failed to meet their burden of demonstrating that the local purpose behind flow control could not be served as well by available nondiscriminatory means. A permanent injunction against New Jersey's

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[1] U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although the Commerce Clause "thus speaks in terms of powers bestowed upon Congress," courts have "long recognized that it also limits the power of States to erect barriers against interstate trade." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 710 (3d Cir.1995) (internal quotations omitted).

[2] For a discussion of how New Jersey's waste flow system actually operates, refer to the discussion by the Third Circuit in *Atlantic Coast*, 48 F.3d at 704-708.

waste flow regulations will be entered, but the effective date of the injunction will be stayed to permit the defendants to review the impact of the injunction and develop alternative arrangements for the management of New Jersey's solid waste.

I. PROCEDURAL HISTORY

Plaintiffs here come from two consolidated cases, *Atlantic Coast Demolition & Recycling, Inc., v. Board of Chosen Freeholders, et al.*, Civ. No. 93-2669 (JEI) ("*Atlantic Coast*"), and *C & A Carbone, et al. v. Shinn, et al.*, Civ. No. 94-3244 (JEI) ("*Carbone II*"). The *Atlantic Coast* case was filed on June 23, 1993, by Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") against the Commissioner of the New Jersey Department of Environmental Protection and Energy (the "State" or "DEP"), the Board of Chosen Freeholders of Atlantic County, the Atlantic City Utilities Authority, the Board of Chosen Freeholders of Camden County, and the Pollution Control Financing Authority of Camden County. Atlantic Coast brought claims pursuant to the Commerce Clause and 42 U.S.C. § 1983 seeking a declaratory judgment that the solid waste plans identified in N.J.A.C. 7:26-6:5 violate the Commerce Clause of the United States Constitution and an injunction against enforcement of these regulations.

Atlantic Coast moved for a temporary restraining order, and on September 2, 1993, after a period of intensive discovery, the Court held a hearing on the motion. On September 8, 1993, the Court rendered its oral findings of fact and conclusions of law. In light of the Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. New*

Jersey Dep't of Envtl. Protection, 857 F.2d 913 (3d Cir.1988), the Court concluded that the waste flow regulations should be analyzed under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and that the state interest served by the waste flow regulations outweighed any burden on interstate commerce. The Court therefore denied Atlantic Coast's application for a temporary restraining order. On September 10, 1993, the Court granted the motion of the Mercer County Improvement Authority and the Gloucester County Improvement Authority for leave to appear as amicus curiae. On February 28, 1994, with the consent of the parties, the Court entered final judgment in defendants' favor on the basis of its prior findings of fact and conclusions of law.

Plaintiff appealed. In an opinion filed February 16, 1995, the Third Circuit reversed this Court's decision and remanded the case for further proceedings. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir.1995). The Third Circuit concluded that in light of the Supreme Court's recent decision in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) ("*Carbone I*"), which was decided after this Court's entry of final judgment, New Jersey's waste flow regulations discriminate against interstate commerce and are subject to heightened scrutiny under the dormant Commerce Clause rather than the less strict *Pike* balancing test. 48 F.3d at 713. However, the Circuit also held that it would remand the matter to the district court to determine whether the regulations could be upheld under strict scrutiny. *Id.* at 718. In doing so, the

Circuit specifically stated that "Atlantic Coast is free at any time to apply for *pendente lite* relief." *Id.*

Atlantic Coast filed a motion for a preliminary injunction on April 12, 1995. Also on that date, this Court granted the motions of Hudson County Improvement Authority, Mercer County Improvement Authority, Essex County Utilities Authority, Passaic County Utilities Authority (the "County Authorities") and Camden County Energy Recovery Associates, L.P., ("CCERA") to intervene as defendants. By order dated May 1, 1995, Cape May County Municipal Utilities Authority ("CMCMUA") was also permitted to intervene in the case.

Carbone II was filed on July 11, 1994, and assigned to the Newark vicinage. The case was brought by C & A Carbone, Inc., the National Solid Waste Management Association, and the Waste Management Association of New Jersey (the "association plaintiffs"), and the mayors of Jersey City and Northvale (the "municipal plaintiffs"), against the State, Bergen County Utilities Authority ("BCUA"), Bergen County Health Department, Hudson County Improvement Authority, and officials at these agencies. The case, which raised essentially the same challenges to the New Jersey waste flow regulations as those brought in *Atlantic Coast*, but which sought damages as well as declaratory and injunctive relief, was stayed pending the Third Circuit's decision in *Atlantic Coast*. When that case was remanded, *Carbone II* was transferred to this Court. On April 12, 1995, this Court granted defendants' motion to consolidate the case with *Atlantic Coast*. On April 17, 1995, the association plaintiffs

and the municipal plaintiffs in *Carbone* II moved for *pendente lite* relief.

The Court indicated that it would exercise its discretion "to reopen the record for supplementary evidence," 48 F.3d at 718 n. 21, in relation to the motions for a preliminary injunction, but the parties elected to proceed on the basis of the previous record before this Court and the briefs, exhibits, and affidavits submitted in connection with the preliminary injunction motions and defendants' response thereto. The *Carbone II* plaintiffs filed an amended complaint on May 25, 1995, in which they added additional municipal plaintiffs. The Court held oral argument on the motions on June 6, 1995, and issued a conditional preliminary injunction on June 9, 1995, only as to the flow control of C & D waste. *Atlantic Coast*, 893 F.Supp. 301 (D.N.J.1995). The Court concluded that a preliminary injunction banning the entire present waste flow regulatory scheme was not warranted at the time due to the substantial harm such an injunction would cause to the defendants and the public. In its order conditionally granting only plaintiff Atlantic Coast's motion for a preliminary injunction, the Court dismissed the municipal plaintiffs from the case.

The State was given additional time to submit an alternative plan for the control of C & D waste in New Jersey. After the State had submitted such a plan, and all parties had been given an opportunity to comment, the Court held oral argument on November 6, 1995. On November 28, 1995, the Court granted the motion for *pendente lite* relief as to C & D waste and issued a preliminary injunction subject to implementation by the State of the alternative plan for the control of C & D waste.

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 909 F.Supp. 229 (D.N.J.1995). The State was given sixty days to implement the plan. The Court also denied plaintiffs' motion for summary judgment, and held that defendants could consider financial concerns as a legitimate local interest in the formulation of an alternative waste disposal system.

On December 11, 1995, the Court granted the motion of the Mayors Task Force to appear as *amicus curiae*. William P. Schuber and Mark Guarino were dismissed as defendants in this consolidated case on December 22, 1995, by stipulation of the parties.

The non-jury trial on the merits took place on May 6, 1996. At the outset, the Court denied plaintiffs' motion for attorney's fees, without prejudice to a later renewal of the motion. Direct testimony was submitted in advance and the parties were given the opportunity to cross-examine witnesses in Court, although no party did so. The parties submitted proposed findings of fact and conclusions of law, as well as pre- and post-trial briefs. Plaintiffs now seek an injunction against the current flow control regulations to the extent these regulations discriminate against interstate commerce.

II. LEGAL BACKGROUND

A. The *Carbone* Decision

In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) ("*Carbone I*"), the Supreme Court held that the waste flow control ordinance of Clarkstown, New York violated the Commerce Clause. The Supreme Court held that, "[d]iscrimination

against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (upholding Maine's ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species)." *Carbone I*, 511 U.S. at ___, 114 S.Ct. at 1683.

The Supreme Court emphasized the need for governments to seek out alternatives which do not discriminate against interstate commerce, and suggested that there are " . . . any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question. The most obvious would be uniform safety regulations enacted without the object to discriminate." *Id.* at ___, 114 S.Ct. at 1683. Under the *Carbone I* standard, arguments about the necessity of maintaining a discriminatory flow control scheme "must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.* at ___, 114 S.Ct. at 1683.

The Supreme Court rejected the argument that waste must be disposed of locally to avoid out-of-state disposal that might be harmful to the environment. Allowing a bias toward local interests for this reason would essentially be an extension of the governmental entity's police power beyond its jurisdictional bounds. *Id.* at ___, 114 S.Ct. at 1683. The Supreme Court also held that by itself, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Id.* at ___,

114 S.Ct. at 1684. In addition to its brief discussion on appropriate facts to be addressed in developing waste disposal plans, the Supreme Court opined as to possible alternatives, stating that the "town may subsidize the facility through general taxes or municipal bonds." *Id.* at ___, 114 S.Ct. at 1684.

B. The Third Circuit Opinions in *Atlantic Coast* and *Harvey & Harvey*

In 1995, the Third Circuit reviewed this Court's opinion denying plaintiff Atlantic Coast's motion for a preliminary injunction. Based on the *Carbone I* decision, the Circuit overruled this Court's earlier opinion, held that the current waste flow laws as implemented discriminate against interstate commerce, and remanded the case to this Court because it was "apparent from the record that the feasibility and effectiveness of alternative measures pose technologically and economically complex issues" which had not been addressed thoroughly by the parties during the earlier proceedings. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 718 (3d Cir.1995). In sum, the Third Circuit found:

> Because we conclude that the waste flow regulations discriminate against interstate commerce on their face or in effect, and that they are not protected from dormant Commerce Clause scrutiny under the market participant exception, the only remaining question is whether the regulations can survive the heightened scrutiny test. "[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State

> to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available non-discriminatory means."

Atlantic Coast, 48 F.3d at 717, *quoting*, *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). Discussing its *Atlantic Coast* holding in a subsequent case, the Third Circuit concluded: "In interpreting *Carbone*, therefore, *Atlantic Coast* did not consider all flow control ordinances to be *per se* discriminatory (and consequently subject to strict scrutiny analysis). Instead, we focused on the process, and invalidated a scheme in which the process discriminated against out-of-state facilities." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 801 (3d Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1265, 134 L.Ed.2d 213 (1996).

The County Authorities argue, as does BCUA, that *Harvey* demonstrates that the Third Circuit opinion in *Atlantic Coast* should not be read as a determination that New Jersey's system of designating service utility providers to supply solid waste disposal services is inherently discriminatory. Accordingly, the defendant Authorities suggest that "the task this Court faces on remand is to decide if the non-legislatively mandated policy goal of the State to ultimately require in-state self-sufficiency in solid waste disposal, in light of the operative facts, passes the test of strict scrutiny set forth in *Maine v. Taylor*." *Post-Trial Brief of County Authorities*, at 3-4. On remand, the Court will not consider whether the waste flow control system is or is not discriminatory, on a state-wide level or on a district-by-district analysis. The Third Circuit found the system to be discriminatory, and

the Court will not revisit the holding.[3] Rather, the Court here must consider (1) whether there are legitimate local purposes addressed by the waste management statutes, and (2) whether these purposes can be served as well by a nondiscriminatory alternative.

III. FINDINGS OF FACT

The Court hereby adopts the Findings of Fact incorporated in its Opinion issued June 9, 1995, which incorporated by reference its Findings of Fact Numbered One through Twenty-Six of its oral Opinion rendered September 8, 1993, and the Third Circuit's detailed discussion of the New Jersey solid waste management system and Atlantic Coast's activities. The Court also adopts the factual discussion in its Opinion dated November 28, 1995.

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[3] The County Authorities argue that the Court could find that the State's policy of self-sufficiency and in-state procurement is not legislatively mandated, and therefore, that the flow control regulations are not *ipso facto* discriminatory. They argue that the regulatory scheme is severable by district, and that the Court could merely require that the State abandon its self-sufficiency policy and allow the districts to hereafter evaluate and select out-of-state processing and disposal services on an equal footing with in-state services. *See Post-Trial Brief of County Authorities*, at 13. BCUA suggests that if the Court followed the proposed approach, the Bergen County district plan could be upheld as nondiscriminatory. The Court notes that in any alternatives developed by the defendants, it may be that little, if any, change is required in some of the district plans in order to eliminate discrimination against interstate commerce. It will not, however, make such a holding at this time.

Pursuant to Fed.R.Civ.P. 52, the Court makes the following additional findings of fact based on depositions, certifications, affidavits, and exhibits submitted by the parties in conjunction with the non-jury trial held on May 6, 1996. These findings address the purposes behind New Jersey's solid waste management system and the existence of alternatives to the current waste flow system.

A. Local Purposes Behind the Waste Flow Regulations

1. The purposes behind the current statewide solid waste management system are: (i) assurance of long-term disposal capacity for all waste generated in New Jersey; (ii) support for development of environmentally safe capacity; (iii) promotion of recycling and source reduction; (iv) assistance in the prevention of illegal dumping and the control of illegal facilities; and (v) protection of the fiscal integrity of governmental entities. *See, e.g., Defendant DEP's Exhibits 36, 37, and 39,* Sondermeyer Certs.; *Defendant DEP's Exhibit 69,* United States District Court Mandated Plan and Impact Study (8/8/95) ("Mandated Plan").

B. The Current System in New Jersey

2. Over the last three decades, New Jersey has developed a system of waste management that brought the State from a crisis situation to one in which waste is disposed of efficiently and with a minimal negative impact on the environment. The Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1 *et seq.*, combined with the provisions of the Solid Waste Utility Control Act,

N.J.S.A. 48:13A-1 *et seq.*, established the comprehensive waste flow control system in place today and evidenced the Legislature's concern over the manner in which the collection, disposal and utilization of solid waste generated within the State was affecting the health, safety and welfare of its citizenry. The Acts constituted an attempt to address these concerns through a systematic and integrated approach to solid waste management. The constitutionality of the system was upheld during its development, and prior to the Supreme Court's holding in *Carbone I*, there was no reason for state officials to believe that the waste management scheme violated either the state or federal Constitution.

3. The SWMA required the development of a statewide solid waste management plan as well as individual plans for each district. N.J.S.A. 13:1E-21. The twenty-two waste management districts in New Jersey developed waste flow plans in accordance with state laws and regulations. New Jersey's system has resulted in the operation of 12 state-of-the-art landfills and 5 energy recovery incinerators. These facilities have been designed to provide suitable capacity into the next century for the solid waste generated within each respective service area. *Defendant DEP's Exhibit 39*, Sondermeyer Cert. (12/3/95) at ¶ 69.

4. Most districts created an authority with the power to acquire, construct, operate, or contract for the operation of facilities for the collection, transportation, processing, recycling, and disposal of solid waste generated within the district in an environmentally sound manner. Among the twenty-two districts, there are eleven utilities authorities, four improvement authorities, two

pollution control financing authorities, and five counties with direct control. *Defendant DEP's Exhibit 13*, Gates Cert. at ¶ 4. The authorities typically were granted, transferred, and assigned the rights, title, and interests of the counties in and under any agreements, documents, regulatory orders and/or moneys relating to management of solid waste. The authorities supervise district solid waste systems which include: (i) facilities to process processible waste; (ii) transfer stations to process non-processible waste and other solid waste; (iii) contracts for transportation and disposal of ash residue produced by the facilities at landfills located outside New Jersey; (iv) programs for re-use, recycling, and source reduction of solid waste generated in-district; (v) fuel-quality assurance programs; and/or (vi) programs for collection, recycling, or disposal of household hazardous waste.

5. In conformity with the Legislature's mandate, and in legitimate reliance upon the judicial findings of the lawfulness of the system, the defendants Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and Passaic County Utilities Authority, after substantial public and governmental debate and participation, planned, constructed and put into operation comprehensive and integrated systems and facilities, executed contracts and lawfully incurred debt obligations designed to assure the safe and efficient disposal of solid waste generated in their districts. *County Authorities' Proposed Findings of Fact.*

6. In 1991, the last year for which data are available, New Jersey generators disposed of 7.1 million tons of solid waste. Of this waste, 4.4 million tons were disposed

of in-state and 2.7 million tons were disposed of out-of-state after being processed at an in-state facility. *Plaintiffs' Exhibit 21*, NJDEP Solid Waste Management State Plan Update (1993-2002), Executive Summary at 16, 46-47. It is estimated that less than two million tons per year are now exported from New Jersey. *Defendant DEP's Exhibit 39*, Sondermeyer Cert. (12/3/95) at ¶ 69.

7. Due to the State's stringent environmental standards, extensive public hearings, and the need for funding, the creation of state-of-the-art facilities for waste can take up to several years. *Defendant DEP's Exhibit 10*, Ciolek Cert. at ¶ 14; *Defendant DEP's Exhibit 49*, Castner Dep. at 17-19.

8. The development of resource recovery facilities was deemed historically by the State to be of vital importance to its paramount goal of assuring safe and adequate disposal of waste over the long-term, which the private industry had not been able to accomplish. Resource recovery facilities, as used in this context, are essentially electric power plants fueled by garbage and used to generate electricity for homes, business and industry. *Defendant DEP's Exhibit 1*, Auerbacher Cert., Exhibit K, *I/M/O Resource Recovery Generic Proceeding*, Decision and Order, BPU Dkt. No. 833-236 (2/23/84) (hereinafter referred to as *"RRF Generic Order"*). Such facilities operate most efficiently when they receive a steady stream of waste. *Defendant DEP's Exhibit 39*, Sondermeyer Cert. (12/3/95) at ¶ 54.

9. New Jersey has established recycling goals of 50% of the municipal waste stream and 60% of the total waste stream by December 31, 1995, and it is well on its

way to achieving those goals, having recycled over 50% of the total waste stream by December 31, 1993. *Defendant DEP's Exhibit 42,* Watson Cert. at ¶¶ 6-7. An integrated waste management system and fee structure encourages recycling and long-term reduction of waste. *Defendant DEP's Exhibit 42,* Watson Cert. at ¶ 18; *Defendant DEP's Exhibits 61-62,* Watson Dep. at 41:22-43:17, 49:4-53:23; *Defendant DEP's Exhibit 69,* Mandated Plan at 29-39; *Defendant DEP's Exhibit 59,* Sondermeyer Dep. (10/27/95) at 69:10-70:1, 107:17-108:17, and 177:17-178:20.

10. New Jersey's recycling programs have been successful in part because of the predictability of the marketplace and the economic incentives to recycle that exist under flow control since tipping fees are artificially high and it becomes cheaper to recycle a given amount of material rather than to place that same amount of material in solid waste collection containers for collection and disposal as solid waste. *Id.* at ¶¶ 11-17. The recycling industry in New Jersey will face additional challenges if flow control is eliminated because the companies will have to compete for their raw materials with out-of-state disposal systems that can charge rates based on uncoordinated and non-comprehensive environmental policies. *Defendant DEP's Exhibit 42,* Watson Cert. at ¶ 18.

11. A highly integrated system of statutes intended to ensure the fiscal integrity of local authorities provides for fiscal oversight of the authorities through the Division of Local Government Services and the Local Finance Board, both within the Department of Community Affairs. Local Authorities Fiscal Control Law, N.J.S.A. 40A:5A-1 *et seq.*; Local Fiscal Affairs Law, N.J.S.A. 40A:5-1 *et seq.*; Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*; Local

Bond Law, N.J.S.A. 40A:2-1 *et seq.*; and, *Defendant DEP's Exhibit 13*, Gates Cert. at ¶¶ 1-2. The regulatory structure in place under New Jersey law provides for public hearings on district plans, as well as a lengthy review process and subsequent DEP approval of the plans. *See* N.J.S.A. 13:1E-9 and rules and regulations implemented pursuant to the statute.

12. The solid waste public debt outstanding in New Jersey as of December 31, 1994, was $1.75 billion, which is the total of 53 separate bonds issued by New Jersey local authorities or counties. *Defendant DEP's Exhibit 26*, Mansmann Cert. at ¶ 2 and Exhibit A. The debt is serviced primarily by using revenues obtained through flow control. This debt estimate is net of and does not include the debt of the New York-New Jersey Port Authority for construction of the Essex County Resource Recovery Facility (approximately $205,000,000 in Consolidated Revenue Bonds). *Id.*

13. Of the New Jersey solid waste debt that remains outstanding, approximately 90% was funded through revenue bonds, approximately 5% was funded through state zero-interest loans, the proceeds of which were authorized to be used for solid waste systems from the Resource Recovery and Solid Waste Disposal Facility Fund established by P.L.1985, c. 330, and less than 5% was financed as general obligation debt. *Defendant DEP's Exhibit 26*, Mansmann Cert. at ¶ 2 and Exhibit A. The marketability of revenue bonds for solid waste facilities depends on an assured source of processible waste for the facilities. *Defendant CCERA's Exhibit 1*, Karpenski Declaration (12/4/95) at ¶ 4.

14. The bond rating agencies have downgraded the current bond ratings of outstanding issues of the Atlantic County Utilities Authority, Camden County Pollution Control Financing Authority, Mercer County Improvement Authority, Passaic County Utilities Authority, and Warren County Pollution Control Financing Authority due to the uncertainty of the fiscal integrity of those authorities as a result of the issuance of the *Carbone I* decision on May 16, 1994, and the *Atlantic Coast* decision in February of 1995. *Defendant DEP's Exhibit 71,* Moody's *Municipal Credit Report* (May 1995) at 2-3.

15. Over half (56%) of the outstanding solid waste public debt is secured only by the tipping fee revenue stream of the districts, while the balance also is secured by a county guarantee, a county deficiency agreement, or insurance. *Defendant DEP's Exhibit 26,* Mansmann Cert. at ¶ 3. Approximately 34% of the outstanding solid waste public debt is secured by bond insurance. *Id.* at Exhibit A. Less than 10% of the outstanding solid waste public debt is secured by county deficiency or guarantee agreements. *Id.* at ¶ 3. The covenants to bondholders on the outstanding solid waste bond issues require that the authorities' facilities be "open and ready for business." *Defendant DEP's Exhibit 26,* Mansmann Cert. at ¶ 6 and Exhibit B.

16. The fees currently charged by the authorities for disposal of waste in-state include both debt expenses and non-debt fixed expenses. The non-debt costs can be grouped into two categories: environmental programs and fixed utility costs. The former include recycling programs, household hazardous waste collection programs, and landfill improvement and closure costs, while the latter include the general and administrative expenses of

the utility authority, such as host community benefits. *Defendant DEP's Exhibit 11,* DeTalvo Cert. at ¶ 6. In the sample group of the Mercer County Improvement Authority, Warren County Pollution Control Financing Authority, Salem County Utilities Authority, and Union County Utilities Authority, the total fixed costs ranged from $17.89 to $26.20 per ton over and above the debt service costs which ranged from $14.07 to $64.64. *Id.* at ¶¶ 6-7.

17. Tipping fees are determined by each authority and require approval by the DEP and the Department of Community Affairs. The average cost of depositing waste in a New Jersey landfill is $75 per ton, the average New Jersey incinerator cost is $90 per ton, and the average New Jersey transfer cost is $111 per ton. The average out-of-state landfill price in the Northeast is $30 to $50 per ton, while the average price of disposal at nearby solid waste facilities is $46 to $90 per ton. The average transportation costs from New Jersey to competing out-of-state facilities is $10 to $20 per ton. *Plaintiffs' Exhibit 73,* Lambert/Brand Letter at ¶¶ (v), (w) and (y); *Defendant DEP's Exhibit 69,* NJDEP Mandated Plan at 24-25, 37, 50-52 (Tables 3, 6, 7 and 11); *Plaintiffs' Exhibit 80,* Lambert Letter at Attachment 1. It is estimated that New Jersey waste generators spend an average of $110 million per year in excess tipping fees, compared to competitive market prices, due to flow control. *Plaintiffs' Prefiled Testimony,* Exhibit 3, Addendum to Expert Witness Testimony of Joel Cooper (March 5, 1995) at ¶¶ 4-5.

18. Three New Jersey counties, Burlington, Middlesex, and Ocean, currently have tipping fees of less

than $45 per ton. Four other counties, Cumberland, Monmouth, Salem, and Union, have tipping fees of less than $70 per ton. Seven counties, Atlantic, Bergen, Hunterdon, Mercer, Morris, Passaic, and Somerset, currently export their waste for out-of-state disposal. *Plaintiffs' Exhibit 9C,* Map of Disposal Method by County.

19. New Jersey's geography raises unique environmental concerns to be addressed in making solid waste management decisions. For example, 50% of the land in Cape May County is designated as the Pinelands Protection Area or the Pinelands National Reserve, and the county has extensive beaches. In addition, the county has a variable population ranging from 95,000 in the off-season to 650,000 in the summer. These characteristics limit the ability of market forces to provide proper solid waste services to the county. *CMCMUA Proposed Findings of Fact.*

C. Feasibility of Nondiscriminatory Alternatives

(a) Elimination of the Current Flow Control Regulations

20. An outright ban of the current flow control regulations without immediate implementation of a new, comprehensive waste management system would have disastrous effects on New Jersey. The decreasing volume of waste caused by increasing competition would result in an escalating tipping fee at disposal facilities, as these facilities attempted to satisfy revenue requirements. Rising prices would result in further decreases of volume

with concomitant increases in prices. This price phenomenon has been referred to as the "death spiral." *Defendant DEP's Exhibit 66,* Winkler Expert Witness Testimony at 12. *See also Defendant DEP's Exhibit 11,* DeTalvo Cert. at ¶ 5. The decreased tipping fees could lead to operating deficits. *Defendant DEP's Exhibit 11,* DeTalvo Cert. at ¶¶ 6-7; *Defendant DEP's Exhibit 54,* Mansmann Dep. (1/19/96) at 129:14-25. Current outstanding solid waste public debt issues would be at substantial risk of default. *Defendant DEP's Exhibit 26,* Mansmann Cert. at ¶¶ 6-10 and Exhibits B-D. A default of any of the outstanding solid waste public debt issues might have negative impacts on the bond ratings of all government entities in New Jersey. *Id.* at ¶ 4.[4] Authorities which dispose of their district's waste at out-of-district facilities might not be able to meet their contractual waste delivery obligations to designated disposal sites. *County Authorities' Proposed Findings of Fact,* at 27.

21. It is clear that if the waste flow system were changed to make it nondiscriminatory from a Commerce Clause perspective, the change could not be carried out simply by ending the flow control regulations. The current system represents a delicate balance – a political compromise – which resolves interests that may at times be compatible and at other times conflicting, such as (i) cost to the public for waste disposal, (ii) protection of the environment from damage by waste disposal activities, (iii) funding for ancillary activities, (iv) the need for recycling, (v) the long-term availability of disposal facilities, (vi) protection of neighborhoods in which disposal

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[4] See ¶ 14 *supra.*

facilities are located, and (vii) protection of the rights of investors who fund the construction of disposal facilities. This list by no means exhausts the variety of interests which must be balanced in developing a waste disposal system for New Jersey. Introducing out-of-state disposal facilities to the mix will require formidable planning, political acumen, and legislative and executive resolve.

(b) Financing Alternatives

22. A ruling that New Jersey's system of flow control impermissibly discriminates against interstate commerce because there are feasible nondiscriminatory alternatives does not indicate that all systems of flow control are *per se* invalid. *Harvey & Harvey, Inc.*, 68 F.3d at 801. The Third Circuit has stated that while statutes which concentrate waste-hauling, processing or disposal business in the hands of a single or limited set of in-state providers are suspect from a dormant Commerce Clause perspective, *id.* at 798, the fact that the designated sites are in-state does not, standing alone, establish that the flow control scheme discriminates against interstate commerce. *Id.*

23. There are a number of alternatives to the current waste flow regulations which may be used to support or underwrite solid waste services. The counties or the State may issue new bonds to replace those currently used to finance the flow control structure. N.J.S.A. 40A:5A-19; *Defendant DEP's Exhibit 65*, Gates Cert.; *Defendant DEP's Exhibit 66*, Winkler Expert Witness Testimony at 12. Or, as suggested by the Bergen County Utility Authority, the authorities could implement "user charges." *Plaintiffs'*

Exhibit 2, BCUA Response to the August 8 State Plan; *Plaintiffs' Exhibit 3*, BCUA's Reply to Plaintiffs' Response to August 8 State Plan. Similarly, a "system benefit charge" could be implemented to make up for funds lost by a cessation of flow control. *Plaintiffs' Exhibit 4*, County Authorities' Response to August 8 State Plan. New Jersey could issue a statewide solid waste special assessment imposed as a tax on all solid waste generated in-state irrespective of its ultimate disposal in interstate commerce. *Defendant DEP's Exhibit 55*, Parker Dep. at 90:6-91:6, 103:13-22, and 248:1-6. A municipality could select the disposal facility to which it will send its solid waste and establish a long-term contract for disposal services. *See Defendant DEP's Exhibit 55*, Parker Dep. at 158:9-12; *Plaintiffs' Exhibit 1*, EPA Report to Congress (March 1995) at ES-12, 13. An alternative could also be funded through municipal, county, or State general revenues. *See Defendant DEP's Exhibit 26*, Mansmann Cert. at ¶¶ 5, 12, 13, 14, Exhibit E. *Defendant DEP's Exhibit 54*, Mansmann Dep. at 133:8-135:12 and 187:8-188:18.

24. All of these alternatives have political, financial, and legal variables, the interplay of which cannot be predicted by the Court. Indeed, even the most sophisticated predictions will be imperfect at best, and the modification of the waste disposal system will be a time-consuming process in which experience will lead to continued modifications. It is impossible to calculate how the individuals, companies, and governmental entities affected by a new system will respond to any set of new rules which govern their economic relationships. The proper responses for each waste management district will surely vary, just as they do under the current system.

Counties with low population density have different problems from high density areas. Counties which already have low disposal costs are clearly better equipped to handle a more competitive environment than those whose fee structure is uncompetitive with other sites. Determining the right combination of alternatives to develop a new system will require extensive planning.

25. Defendants have not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests identified in ¶¶ 1 and 21, *supra*, as well or better than the current flow control regulations. Indeed, defendants have not even attempted to present a feasible nondiscriminatory alternative to the Court, but have merely caricatured each of the tools that may be used in building a new system.[5] The litigation lens has neither magnified nor clarified the true feasibility of alternatives; it has only distorted the available choices. Each party has presented the Court with extreme, and generally cursory, conclusions designed to buttress its litigation posture. Plaintiffs paint a rosy picture of simple systemic change that will save money in the long-run, while defendants conjure a parade of horribles.

26. The current complex system did not develop spontaneously as an integrated whole. Rather, it emerged piecemeal as the culmination of various legislative, executive and regulatory actions, supported, as well, by

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[5] The Third Circuit recognized what has been obvious throughout this litigation: "New Jersey has vowed not to abandon its present system until compelled to do so." *Atlantic Coast*, 48 F.3d at 718.

favorable judicial decisions. When New Jersey was faced with a waste crisis of monumental proportions, the legislative and executive branches of government rose to the occasion, and developed a framework for waste disposal that it had every right to believe was constitutional, environmentally sound, and effective in providing a long-term solution to intractable problems. The United States Supreme Court has changed the rules of the game since then, and the government must now employ that same skill and energy to develop an alternative which passes constitutional muster. A new system cannot be cut of whole cloth but will require legislative, executive, and judicial deliberation over the course of many years.

27. The costs of implementing a nondiscriminatory alternative cannot be identified with precision. *See Defendant DEP's Exhibit 57,* Poole Dep. at 27, 31, and 34-35 (estimating that overall cost of solid waste financing over the next two decades would change, on a "cash flow" basis, from $2.60 billion under the existing bonds to $2.64 billion under so-called refunding bonds, an increase of less than 1.7% of the cost of the current bonds issued under flow control), *compared to Defendant DEP's Exhibit 66,* Winkler Expert Witness Testimony at 11-13 (concluding that four of the five authorities surveyed would lose, on a net present value basis, in excess of $39.0 million if current waste flow bonds were refunded). Nor will the pain inflicted by change necessarily be evenly spread. When the economic ground rules change there are winners and losers. It is hoped that the political process will attempt to fairly distribute any economic pain caused by the change.

28. In analyzing the effect of dismantling the current flow control regulations, the Court is not convinced that the change will increase the overall cost of waste disposal for the citizens of New Jersey. It would seem that the availability of out-of-state disposal facilities coupled with some intrastate competition will reduce rather than increase the costs of waste disposal, even if the modified system is developed in a manner consistent with the State's expressed goals.[6]

29. It is not the role of the judiciary to redesign New Jersey's waste management and disposal system. If ever there was a responsibility that belongs to the other branches of government, this is it. Modifying the system to guarantee that it is cost effective and environmentally sound, while offering protection to those who properly relied on the existing waste flow regulations, requires a delicate balancing act properly left to the political process. The judiciary's role must be limited to determining whether any new proposal is constitutional.

(c) Recordkeeping

30. Recordkeeping by private industry regarding solid waste prior to its disposal in interstate commerce historically has been inaccurate and has not provided the State with sufficient information to plan properly for waste disposal and to ensure the waste is disposed of in a

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[6] Certainly many elected municipal officials believed this to be the case, as evidenced by their decision to join their municipalities as plaintiffs in this litigation.

manner that is consistent with federal law and does not cause harm to the environment.

31. While defendants have identified difficulties with maintaining adequate records from private industry, they have not established that laws or regulations could not be implemented to provide for better recordkeeping mechanisms.

(d) Environmental and Enforcement Concerns

32. Municipalities are potentially liable for remediation costs if they generate or arrange for the disposal of municipal solid waste at solid waste landfills that become designated as Superfund sites under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 *U.S.C.* §§ 9601 *et seq.*

33. According to the United States Environmental Protection Agency, as reported to Congress: "[r]egardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations that fully protect human health and the environment. Accordingly, there are no empirical data showing that flow control provides more or less protection." *Plaintiffs' Exhibit 1,* EPA, Report to Congress at II-5 (March 1995).

34. New Jersey has operated under the assumption that solid waste flow directives may serve to reduce the potential risk of CERCLA liability through designation of disposal facilities which possess state-of-the-art environmental controls. *Defendant DEP's Exhibit 9,* Castner Cert. at ¶ 8. It has been the policy of the DEP to try to avoid or

reduce future Superfund liability for New Jersey municipalities and businesses by avoiding the disposal of solid waste at facilities which lack fundamental environmental controls such as liners and leachate collection systems. *Defendant DEP's Exhibit 49,* Castner Dep. at 40:2-41:15.

35. The State does not believe, however, that there is a greater risk of future liability to New Jersey generators of waste arising from out-of-state disposal at out-of-state landfills which may be "grandfathered" from compliance with the subtitle D standards of the Resource Conservation Recovery Act, 42 U.S.C. §§ 6941-6949a, rather than in-state facilities, because all of the major facilities in close proximity to New Jersey's borders meet these standards. *Defendant DEP's Exhibit 60,* Sondermeyer Dep. (12/28/95) at 329-331.

36. The cessation of flow control will not interfere with New Jersey's efforts to close dumps and unsafe landfills, as the State has already largely accomplished that objective. *Defendant DEP's Exhibit 60,* Sondermeyer Deposition (12/28/95) at 258-59, 369.

37. New Jersey could supplement its laws to require recycling or source separation of materials created in-state or to provide other financial incentives to those who do so voluntarily, in order to encourage privatization of the recycling industry. *See,* N.J.S.A. 13:1E-92 *et seq.* (Clean Communities and Recycling Act); N.J.S.A. 13:1E-99.11 *et seq.* (New Jersey Statewide Mandatory Source Separation and Recycling Act).

38. In their current form of operation, facilities limit the flow of toxic constituents in the waste stream brought to incinerators and ensure continued operation within

environmental permit parameters. Absent any control over the flow of waste, these secondary collection systems at facilities cannot be carried out in their current form. *Defendant DEP's Exhibit 39,* Sondermeyer Cert. (12/3/95) at ¶¶ 56 and 67; *Defendant DEP's Exhibit 7,* Callahan Cert. (12/4/95) at ¶¶ 8 and 15. New Jersey's toxicity reduction and recycling programs are funded through taxes on solid waste brought for disposal or through the user fees paid at disposal facilities in the state. *Defendant DEP's Exhibit 60,* Sondermeyer Dep. (12/28/95) at 187:1-196:5.

(e) Weighing and Monitoring

39. The actual volume of waste generated in New Jersey will not increase due to an injunction against flow control. However, permitting generators a wider choice of disposal sites may increase the total number of miles travelled by trucks carrying waste. This increase may create not only additional noise, odor and air pollution, but more wear and tear on the State's road system.

40. Although the State argues that only flow control can deal with this problem, the current system permits route control as part of the process of approving transfer stations and other disposal sites. *See, e.g.,* N.J.A.C. 7:26-3.4(j). There is no reason the defendants cannot adopt additional neutral rules regulating truck routes for waste transporters using the State's thoroughfares. New Jersey could (i) provide for expanded route control for the movement of waste whether in-state or out-of-state, (ii) adopt special licensing and inspection provisions for vehicles carrying waste, and (iii) increase enforcement

measures, as other states have done. For example, in 1989, Pennsylvania instituted "Operation Trashnet" in response to traffic accidents that had been occurring with garbage trucks driving through the State. Under Operation Trashnet, the State Police set up checkpoints on Routes 80 and 78 and began intensive inspections of solid waste vehicles. Many vehicles from New Jersey were turned back at the border. *Defendant DEP's Exhibit 39,* Sondermeyer Cert. (12/3/95) at ¶ 59.

IV. CONCLUSIONS OF LAW

A. The Current System

Waste disposal has become a multi-billion dollar industry in the United States, and with the growth in the garbage market has come recognition from the judiciary that "[s]olid waste . . . is an article of commerce" which merits Commerce Clause protection. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353, 359, 112 S.Ct. 2019, 2023-24, 119 L.Ed.2d 139 (1992). Whether the business arrangements between New Jersey generators of waste and out-of-state disposal sites are viewed as "sales" of garbage or "purchases" of transportation and disposal services, "the commercial transactions unquestionably have an interstate character." *Id.*

New Jersey has been waging a war against waste for decades and has decided that this war is best fought with its own troops. The goal has been to design a waste management system which does not rely on help from other states. Companies operating in interstate commerce now seek to join the fray. While the State might view

Atlantic Coast and the Carbone plaintiffs as foreign mercenaries seeking adventure in the waste war, the Constitution's Commerce Clause does not permit New Jersey to bar enlistment of foreign troops solely because of their alienage.

Alternatives to the current flow control system do exist. The above-market tipping fees that constitute the heart of New Jersey's flow control system are more or less a hidden tax paid by New Jersey residents. The tipping fees are used to cover not only the debt service of the bonds issued to fund facilities under flow control, but also to cover the fixed costs of operating waste disposal facilities, financing recycling programs and other environmentally friendly recovery projects, and developing long-term disposal plans. Those activities could be financed through upfront taxes, user fees or other charges which do not discriminate against interstate commerce. Even if there are significant costs to implementing the necessary revisions to the current flow control system, nothing in the record suggests that these would be exorbitant or beyond the capabilities of reasonable fundraising alternatives. And, in any case, the threat of some increase in costs cannot negate the constitutional mandate of the dormant Commerce Clause.

B. Standard of Review

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. This clause has long been interpreted to have a "negative" aspect that prohibits States from unjustifiably discriminating against or

burdening the interstate flow of commerce. *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994). If a state law discriminates against interstate commerce by benefitting in-state economic interests at the expense of out-of-state interests, it is subject to heightened scrutiny by the courts.

When a court applies a heightened scrutiny analysis to a state law that has been challenged as unconstitutional, it is the defendants' burden to establish that there are no feasible nondiscriminatory alternatives to meet the legitimate state purposes. Because the Third Circuit has already determined that the current New Jersey waste flow regulations discriminate against interstate commerce, the burden is now on the defendants to demonstrate both that those regulations serve legitimate local purposes, and that these purposes cannot be served as well by available nondiscriminatory means. *Atlantic Coast*, 48 F.3d at 717, quoting, *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986).

There clearly is a valid local purpose to the flow control regulations. However, the State has not met its burden of demonstrating an absence of feasible nondiscriminatory alternatives. This burden cannot be met by a brief sketch of one potential alternative, followed by its summary rejection. The defendants must compare the flow control regulations with alternative, comprehensive plans. In its submissions to the Court, the State does not attempt to develop a comprehensive, cohesive plan using the wide variety of political and financial tools available to it. Rather, the defendants have looked at a series of one-dimensional alternatives in isolation and only

attempted to prove that no one technique (e.g., system benefit charges, user fees, new taxes, refunding bonds, county or state assumption of debt) can possibly do the job. These isolated distortions do not constitute a fair and adequate attempt at evaluating available alternatives. A simple statement that there are no alternatives to the current system, and that all other plans are at best "damage control," will not suffice to meet defendants' burden of proof.

C. Legitimate Local Interests

Traditionally, courts have upheld state statutes affecting interstate commerce which address public health, transportation safety, and environmental concerns. *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535-36, 57 L.Ed.2d 475 (1978). *See also Chambers Medical Technologies of South Carolina, Inc. v. Bryant*, 52 F.3d 1252, 1261 (4th Cir.1995), *citing Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 795, 54 L.Ed.2d 664 (1978). On the other hand, if measures are passed ostensibly to support the health or safety of the citizenry, but in fact constitute protectionism by the legislating state, the purpose is invalid. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 399 (3d Cir.1987) ("the Commerce Clause is designed to eliminate protectionist restrictions on interstate trade which typically characterize international trade, such as embargoes, quotas, and tariffs"). *See also New Energy Co. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988). In addition, while the Supreme Court has held that financial issues alone cannot justify a statute, *Carbone I*, 511 U.S. at ___, 114 S.Ct. at 1684 ("[b]y itself, of course, revenue generation is not a

local interest that can justify discrimination against interstate commerce"), the Court finds that a government must be allowed to consider the cost of available alternatives. An option accompanied by an exorbitant price-tag might legitimately be deemed infeasible.

The State summarized its purposes behind the waste flow regulations as: (i) assurance of long-term disposal capacity for all waste generated in New Jersey; (ii) support for development of environmentally safe capacity, including resource recovery facilities; (iii) promotion of recycling and source reduction; (iv) assistance in the prevention of illegal dumping and the control of illegal facilities; and (v) protection of the fiscal integrity of governmental entities. Similar goals have been cited in support of other state actions, and have been upheld by the courts. *See, e.g., Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 343, 112 S.Ct. 2009, 2014, 119 L.Ed.2d 121 (1992). The Court finds that "there is little reason . . . to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a 'post hoc rationalization,' " *Maine v. Taylor,* 477 U.S. 131, 149, 106 S.Ct. 2440, 2453, 91 L.Ed.2d 110 (1986), *citing Hughes v. Oklahoma,* 441 U.S. 322, 338, n. 20, 99 S.Ct. 1727, 1737, n. 20, 60 L.Ed.2d 250 (1979), and therefore, it concludes that the local interests set forth by defendants are legitimate.

D. Timeframe of Analysis and Availability of Alternatives

In considering the feasibility of nondiscriminatory alternatives, the question arises as to the time period in which the Court should conduct its inquiry. The existence

of feasible alternatives was a very different matter in the 1970s, when New Jersey began developing its waste flow system, than it is today. The Court recognizes that New Jersey, a densely populated and ecologically sensitive state, may be unique in the magnitude of its waste problem and in the comprehensiveness of its remedy, and that its problems are not comparable to those in other parts of the country. The Court also recognizes that the solid waste system has been challenged in the past and has been upheld, causing legitimate reliance on the system.

In *Maine v. Taylor*, the Supreme Court considered whether there were nondiscriminatory alternatives to the Maine statute prohibiting the importation of baitfish. The Supreme Court concluded that the

> "abstract possibility" . . . of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]," *Hunt*, 432 U.S., at 353 [97 S.Ct., at 2446], for purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.

Maine, 477 U.S. at 147, 106 S.Ct. at 2452. The Court Supreme [sic] continued: "if and when [scientifically acceptable] procedures are developed, Maine no longer may be able to justify its import ban." *Id.*

This language suggests to the Court that it must consider the available alternatives in existence at the time

the constitutional challenge is raised. The analysis, however, must be informed by the twenty-five year history of New Jersey's development of the waste flow regulations in its struggle to address public crises and strive for environmentally sound waste management. The defendants relied on judicial holdings that their system was legal, and this reliance was reasonable, at least through the issuance of the *Carbone I* decision. For purposes of injunctive relief the Court will consider alternatives in existence today, but it will not award damages against public bodies or officials, who reasonably believed that the waste control system was constitutional.[7] The Court must now consider whether defendants have proven that there are no nondiscriminatory alternatives available to meet their legitimate local interests.

E. Existence of Nondiscriminatory Alternatives

Defendants argue that the nondiscriminatory alternatives of implementing a "user fee" or a "systems benefits charge" are not available because their constitutionality is uncertain under New Jersey law. Similarly, defendants suggest that the refunding of bonds is not truly feasible because such an undertaking has never been carried out

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[7] To the extent that the *Carbone II* plaintiffs would still argue for damages, the Court finds the argument does not merit a discussion. First, there has been insufficient proof as to damages. Second, it appears that a recovery against the State defendant is barred by the Eleventh Amendment, as noted by the Court in its Opinion of June 9, 1995. *Atlantic Coast*, 893 F.Supp. at 309.

in New Jersey. To make a finding of feasibility, the defendants would have the Court analyze the amount of political support behind a particular alternative, the legislative climate in the New Jersey Legislature, and other political ramifications. Indeed, defendant Camden County Energy Recovery Authority asks the Court to take judicial notice that "it is highly unlikely that elected officials at the State or local level will pass revenue measures that do more than the bare minimum, i.e., pay for debt service" such that "the other costs involved in the salutary State programs to develop capacity, close landfills, promote recycling and help police the solid waste industry could well be the victims of political pressure to keep the disposal costs down at the expense of the long term public interest." *Post-Trial Brief of Camden County Energy Recovery Associations* at 13-14.

When the Supreme Court established the standard of analyzing alternatives, it was dealing with a quantifiable variable – available scientific knowledge. *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. at 2443. The Supreme Court has never suggested that the availability of a feasible alternative should somehow depend on a court's speculation about a state's political climate or its political will to implement an otherwise feasible plan. Indeed, the Constitution is in many ways intended to resist popular mandates, not to be ruled by them. Defendants suggest that the alternatives are "entirely speculative" and, as such, do not "make those procedures an available non-discriminatory alternative." *Maine v. Taylor*, 477 U.S. at 147, 106 S.Ct. at 2452, *quoting Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Most of the arguments

espoused by the defendants, however, derive not from the lack of a feasible nondiscriminatory alternative, but from an assumption that New Jersey lacks the political willpower to do the job.

Many years ago New Jersey rose to meet a challenge posed by a soaring flow of waste, and the political will was found to create a complex system of which the State can be proud. The present challenge has been presented not by more garbage, but by the Supreme Court of the United States. Meeting this challenge is feasible and may even be desirable.

A review of case law suggests to the Court that its analysis of feasibility should center upon what is "constitutionally permissible" rather than what is "politically palatable." *See, e.g., Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 345, 112 S.Ct. 2009, 2015-16, 119 L.Ed.2d 121 (1992) (citing as options a per-ton additional fee on all hazardous waste, a per-mile tax on all vehicles transporting hazardous waste across the state, or a cap on the total tonnage landfilled at sites); *SDDS, Inc. v. State of South Dakota,* 47 F.3d 263, 272 (8th Cir.1995) (in reviewing constitutional challenge to referendum, court found that nondiscriminatory alternatives exist because state could have held a different type of legislative discussion); *Chambers Medical Technologies of South Carolina, Inc. v. Bryant,* 52 F.3d 1252 (4th Cir.1995) (listing examples of nondiscriminatory alternatives without elaboration, including establishment of additional parking facilities, regulation of containers used in transport, and imposition of more stringent incineration requirements). The Supreme Court has stated that a "marginal loss in convenience would not constitute the kind of serious health

and safety concern that we have sometimes found sufficient to justify discriminatory state legislation." *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 84, 112 S.Ct. 2365, 2373, 120 L.Ed.2d 59 (1992).

1. Financing an Alternative

There is no doubt that flow control has been a crucial tool in maintaining the revenues necessary to finance the current system. Notwithstanding this Court's injunction, it is possible that a modified version of flow control could be developed if it were based not on mandatory direction of in-state waste to in-state facilities, but rather, upon long-term contracts between disposal facilities and waste generators. *See Harvey & Harvey*, 68 F.3d at 808-09, and at 811 (Nygaard, J., dissenting). As long as the disposal site selection process were not biased toward in-state providers, it appears that such a system would not violate the Commerce Clause.

The Supreme Court has recognized that "interstate commerce may be made to 'pay its way.' " *Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1351, 128 L.Ed.2d 13 (1994). There are a variety of ways to garner such payments from participants in interstate commerce, or to otherwise fund waste disposal. For example, it has been suggested that the fiscal integrity of the local solid waste authorities would be protected if the municipalities entered into long-term disposal contracts with the solid waste management district-designated facilities which required the use of that facility. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1419,

134 L.Ed.2d 544 (1996); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 911, 133 L.Ed.2d 842, *reh'g denied*, ___ U.S. ___, 116 S.Ct. 1453, 134 L.Ed.2d 571 (1996).

Given sufficient time and the will to act, the State can amend laws and develop new regulatory structures which will create an environmentally sound waste management system on a cost effective basis while protecting investors and businesses which reasonably relied on the law as it has existed until now.

The cessation of flow control and the unleashing of competitive forces may benefit ultimately rather than injure individual taxpayers. Municipalities have expressed support for an end to flow control, anticipating a decrease in the tipping fee which they currently are required to pay. The entities that pay high tipping fees under flow control surely pass on this cost to consumers. As the competition to provide waste disposal services to New Jersey residents increases, the consumer may see a decline in the fees charged for waste disposal even if some or all of the savings are offset by levies or fees that may be required to fund hazardous waste collection programs, long-term planning, administrative costs, recycling programs, and the like.

2. Additional Concerns

A portion of the tipping fee currently charged to dump waste in New Jersey provides revenue for the recycling, resource recovery, and other environmental programs instituted by the State. These costs could be assessed more directly against waste generators in New

Jersey through some other means, or another funding mechanism could be found to provide the necessary revenue to support New Jersey's admirable recycling projects.

To meet its other environmental goals, the State can pass additional regulations governing activities of in-state waste generators, regulations which will equally affect in-state and out-of-state disposal facilities. For example, in *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652, 662 (7th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1351, 134 L.Ed.2d 520 (1996), the Seventh Circuit suggested that to meet its goals of conserving landfill space and protecting the environment by recycling, the State could require that "all waste entering the State first be treated at a materials recovery facility with the capacity to effect" a separation of recyclables. It may be possible for New Jersey to implement the reverse of such a regulation, that is, one requiring that all waste be treated at a materials recovery facility before disposal, whether it is being deposited in-state or transported out-of-state.

New Jersey's concern about liability for environmental harms that may occur at sites in other states where New Jersey waste is deposited is not supported by the facts. Federal laws require all disposal sites to meet certain criteria, and New Jersey officials have concluded that the major facilities near its borders – where it is most likely that New Jersey waste would be deposited out-of-state – meet federal environmental standards. In addition, New Jersey certainly could develop regulations governing in-state generators' deposit of waste out-of-state, to ensure that the selected out-of-state disposal sites meet federal regulations.

Enforcement and monitoring are largely factors of cost, and New Jersey will be able to meet these goals if it is willing to fund greater efforts in these arenas. Because there are nondiscriminatory alternatives to the present waste flow regulations by which defendants can meet their legitimate local interests, the Court will enjoin defendants from further enforcement of those regulations.

V. CONCLUSION

The plaintiffs seek to enjoin enforcement of the waste flow control laws in New Jersey. As defendants have failed to prove that the goals of flow control cannot be met adequately by a nondiscriminatory alternative, the Court must conclude that New Jersey's system of flow control of waste violates the Commerce Clause of the United States Constitution.

Many of the arguments made by the defendants derive not from the lack of feasible nondiscriminatory alternatives, but from the fear that political realities will present insurmountable obstacles to effecting change. The Court recognizes the enormity of the task which *Carbone I* and the Third Circuit opinion in *Atlantic Coast* have imposed on New Jersey citizens. To scrap immediately a detailed regulatory plan implemented over the course of decades and relied upon by investors, business people, and political figures would wreak havoc on the financial and environmental well-being of New Jersey citizens. The Court must permit the relevant governmental bodies to develop the specific nondiscriminatory alternative which they wish to employ, and this development cannot be

done overnight. In the past, the State rose to the challenge of developing a comprehensive waste management structure and did so in a manner meriting great praise. The Court does not doubt that given ample time, the State government can again use its ingenuity to create a nondiscriminatory alternative to the current flow control structure.

The preliminary injunction entered by the Court on November 28, 1995, against the enforcement of waste control over C & D waste will be made permanent and will continue to be enforced. In addition, the Court will grant an injunction pursuant to Fed.R.Civ.P. 65 against the enforcement of the waste flow regulations governing the remainder of New Jersey waste. Under the injunction, defendants will not be permitted to enforce the current waste flow regulations to the extent their application discriminates against interstate commerce. This injunction (other than as to C & D waste) will be stayed, however, to give the defendants sufficient time to devise the specific nondiscriminatory alternative which they choose to implement to replace the current flow control regime. The stay will be in place for two years following the date on which this case is no longer subject to the right to appeal, or is no longer pending on appeal or on Petition for Certification to the United States Supreme Court.

An appropriate Order will be issued.

FINAL JUDGMENT DECLARING NEW JERSEY WASTE FLOW REGULATIONS UNCONSTITUTIONAL, ENJOINING DEFENDANTS

FROM ENFORCEMENT OF THE REGULATIONS, MAKING PRELIMINARY INJUNCTION OVER C & D WASTE PERMANENT, STAYING INJUNCTION EXCEPT AS TO C & D WASTE, AND DENYING ALL CLAIMS FOR MONETARY DAMAGES

For the reasons stated in an Opinion issued on even date herewith, **IT IS**, on this 15th day of July, 1996, **ORDERED THAT**:

1. **FINAL JUDGMENT** is here entered in favor of the Plaintiffs and against the Defendants declaring that those portions of the New Jersey waste flow regulations, as set out in the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 to – 207, the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 *et seq.*, and regulations promulgated thereunder, N.J.A.C. 7:26-1.1 *et seq.*, are unconstitutional to the extent that they discriminate against interstate commerce by operating to deprive out-of-state disposal facilities the opportunity to compete for New Jersey disposal business.

2. An **INJUNCTION** is hereby entered pursuant to Fed.R.Civ.P. 65 against enforcement of the New Jersey waste flow regulations to the extent these regulations discriminate against interstate commerce as determined in the first decretal paragraph of this Final Judgment.

3. Pursuant to Fed.R.Civ.P. 62 and the discretion of this Court, the **INJUNCTION** shall be **STAYED** for two years following the date on which this case is no longer subject to a right of appeal, or is no longer pending on appeal or on Petition for Certification to the United States Supreme Court.

4. The **PRELIMINARY INJUNCTION** governing only flow control of construction and demolition ("C&D") waste in New Jersey, entered by this Court on November 28, 1995, is hereby made **PERMANENT**, and to the extent that the Court's **INJUNCTION** governs C & D waste it shall not be stayed. The Court's Order of November 28, 1995, requiring the plaintiffs to post a bond required by Fed.R.Civ.P. 65(c) is hereby **VACATED**.

5. **FINAL JUDGMENT** in favor of the Defendants and against the Plaintiffs is hereby entered on all claims for monetary damages.

6. All applications for counsel fees and costs shall be filed with the court not later than August 12, 1996.

Nos. 97-0400 and 97-0430

Supreme Court, U.S.
OCT 9 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,
Petitioners,
v.
ATLANTIC COAST DEMOLITION & RECYCLING, INC., *et al.*,
Respondents.

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,
Petitioner,
v.
ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR C & A CARBONE, INC., NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AND WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY IN OPPOSITION

JOSEPH TORRE
TORRE & TORRE
456 Boulevard
Hasbrouck Heights, NJ 07604
(201) 935-7110

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
WILLIAM T. HASSLER
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-0400

ESSEX COUNTY UTILITIES AUTHORITY,
HUDSON COUNTY IMPROVEMENT AUTHORITY,
MERCER COUNTY IMPROVEMENT AUTHORITY,
PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,
Petitioners,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., *et al.*,
Respondents.

No. 97-0430

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,
Petitioner,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR C & A CARBONE, INC., NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AND WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY IN OPPOSITION

Respondents C & A Carbone, Inc., the National Solid Wastes Management Association, and the Waste Management Association of New Jersey ("Carbone Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioner Robert C. Shinn, Jr. ("Commissioner," "New Jersey," or "the State") and the Petition for Writ of Certiorari filed by Petitioners Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and Passaic County Utilities Authority ("County Authorities").[1]

STATEMENT OF THE CASE

These cases involve constitutional challenges to the State of New Jersey's solid waste flow control regulations under the dormant Commerce Clause. Respondent Atlantic Coast Demolition & Recycling, Inc., a Pennsylvania corporation, brought this action in 1993 seeking declaratory and injunctive relief. The district court analyzed New Jersey's solid waste regulations under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and entered judgment in favor of defendants. Atlantic Coast appealed.

During the pendency of the appeal, this Court decided *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In *Carbone*, the Court found that a local flow control ordinance discriminated against interstate commerce because it "hoards solid waste, and the demand to get rid of it, for the benefit of" local business. *Id.* at 392. It could thus be upheld only if the municipality could "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* The Court rejected the public health, environmental, and financial justifications offered in support of the ordinance and determined that the Clarkstown ordinance

[1] For the Carbone Respondents, there are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.6 of this Court.

could not survive strict scrutiny and was unconstitutional. *Id.* at 393-94.

The court below recognized in its 1995 decision that the principles announced in *Carbone* had a direct bearing on the outcome of the case. Pet. App. 22.[2] Noting that "New Jersey's flow control regulations accomplish on a district level substantially what Clarkstown's flow control ordinance accomplished on a local level," *id.* at 27, the Third Circuit concluded that New Jersey's flow control regulations "discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required." *Id.* at 20. It considered the State's claim to market participant status, but found that "New Jersey's waste flow control regulations were . . . promulgated by it in its role as a market regulator, not in its capacity as a market participant." *Id.* at 39. The Third Circuit remanded the case to the district court with instructions to apply the strict scrutiny test and to provide the State an opportunity to prove that it lacked any nondiscriminatory means for achieving its legitimate goals. *Id.* at 40-42.

The Carbone Respondents, meanwhile, had filed a similar challenge to New Jersey's flow control regulations, which had been stayed pending the Third Circuit's 1995 decision. The two cases were consolidated on remand. After extensive proceedings, the district court concluded that the State and its allies had "not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests identified [by them] as well or better than the current flow control regulations." Pet. App. 272.[3] The district court thus de-

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[2] The content and pagination of the appendices filed by Commissioner Shinn and the County Authorities are identical. Therefore citations in this brief to "Pet. App." refer to the two appendices interchangeably.

[3] The district court and the Third Circuit both found that tipping fees in New Jersey are set well above market rates for solid waste disposal. Pet. App. 13, 267.

cared the flow control regulations unconstitutional and enjoined their enforcement. *Id.* at 291-93. However, the district court—without conducting further evidentiary proceedings—simultaneously stayed its injunction for a period of two years following the completion of all appeals and petitions to this Court. *Id.* at 291-92.[4]

New Jersey and the County Authorities appealed that portion of the judgment declaring the flow control regulations unconstitutional. The Carbone Respondents appealed that portion of the judgment that imposed the two-year post-appeal stay. On appeal, the Third Circuit affirmed the district court's factual determination that nondiscriminatory alternatives to flow control are available to the State and the County Authorities, and its conclusion that the flow control regulations were thus unconstitutional. Pet. App. 130, 133-34, 138. The court below reversed the district courts' two-year post-appeal stay, concluding that "[w]hatever the district court's power may be to delay constitutional relief, none of the justifications raised by the defendants support the extraordinary act of delaying the injunction of an unconstitutional law." *Id.* at 143.

REASONS FOR DENYING THE WRIT

The Petitions meet none of this Court's criteria for the exercise of its certiorari jursdiction. The Third Circuit's decisions involve the straightforward application of the Commerce Clause principles enunciated in *Carbone* to a solid waste regulatory scheme that similarly discriminates against interstate commerce. There is no circuit conflict on any of the questions raised in the Petitions; the purported conflicts cited in the County Authorities's Petition

[4] The injunction was made effective immediately with respect to construction and demolition waste, a small percentage of New Jersey's total solid waste stream and the portion contested by Atlantic Coast Demolition & Recycling, Inc. The two-year post-appeal stay of the injunction was applied to all other types of solid waste, representing almost 90 percent of the solid waste stream. Pet. App. 291-93.

(at 13-16) involve cases fully consistent with the Third Circuit's decisions or factual circumstances not present in this case. Nor is there any inconsistency between this Court's Commerce Clause jurisprudence and its public utility jurisprudence, as alleged in the Petitions. In their attempt to identify a conflict or inconsistency where none exists, the County Authorities are really seeking an advisory opinion from this Court regarding the constitutionality of factual scenarios and regulatory alternatives not at issue in this case. There is no reason for this Court to undertake such an evaluation.

Furthermore, the Petitions do not raise questions of recurring or widespread national importance. New Jersey's solid waste regulatory system differs markedly from the approach taken by other states, and thus a decision on the merits would be limited to the unique facts of this case. The Third Circuit did not break any new ground, but followed settled precedent when it applied the principles set down in *Carbone* to the facts of this case, rejected the public utility and market participant arguments, and vacated the post-appeal stay. There is no occasion for further review by this Court.

I. THE PUBLIC UTILITY ARGUMENTS RAISED BY PETITIONERS PRESENT NO ISSUE THAT WARRANTS REVIEW BY THIS COURT.

Petitioners seek to avoid the clear teachings of *Carbone* by arguing that their flow control regulations must be judged by a more lenient standard because New Jersey has chosen to utilize a public utility model of regulation for solid waste. Petitioners maintain that public utility regulations, by definition, are exempt from the strict scrutiny applicable to other discriminatory state regulations, and subject to review only under the less stringent balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The court below rejected this argument:

> [W]e do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other

> state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

Pet. App. 29.

The Third Circuit's conclusion comports with this Court's admonition in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983), that: "Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence." *See also Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992), and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 (1982) (applying heightened scrutiny to invalidate discriminatory state public utility regulations).

The Court's recent decision in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997), is in no way inconsistent. In *Tracy*, this Court specifically reaffirmed *Arkansas Electric*, noting that state utility regulation "is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence." *Id.* at 820 n.8. The Court made clear that "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny. . . . ." *Id.* at 828 n.15. The *Pike* test, on the other hand, was described in *Tracy* as the standard used to evaluate "nondiscriminatory state legislation" under the dormant Commerce Clause. *Id.* at 824 n.12. In sum, nothing in this Court's decision in *Tracy* is inconsistent with the Third Circuit's application of strict scrutiny to New Jersey's discriminatory flow control regulations.

Nor is there any inconsistency between the findings of the court below and this Court's public utility decisions. The court below applied strict scrutiny only after it found that "New Jersey's waste flow regulations, in effect and

by design, discriminate against interstate commerce. . . ." Pet. App. 20. This finding was amply supported by the State's own solid waste management plan, which provides that it is " 'a key policy objective' " of New Jersey to achieve "self-sufficiency in disposal capacity. The Department's objective is to eliminate reliance on out-of-state disposal within a seven-year period." *Id.* at 14 (internal citations omitted). The court below found that "NJDEP's policy of attaining self-sufficiency has favored operators that have facilities within the state or that are willing to construct a facility there." Pet. App. 113; *see id.* at 15.[5] This finding amply supports the lower court's conclusion that New Jersey's regulations discriminate against interstate commerce.

In contrast, the Court in *Tracy* found that the plaintiff had failed to prove discrimination, expressly noting that the Ohio courts "might well extend the challenged exemption to out-of-state utilities if confronted with the question." *Tracy*, 117 S. Ct. at 830.[6] Similarly, in *Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 336 (1951), the Court found "no discrimination against interstate commerce."[7] Given this different factual premise, there is no inconsistency between *Tracy's*

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[5] The State unequivocally reaffirms these policy objectives in its Petition. Shinn Pet. at 5.

[6] The record in *Tracy* established that a Pennsylvania public utility that sold gas to Ohio consumers qualified for the challenged exemption under an Ohio Board of Tax Appeals ruling. *Id.*

[7] *Id.* at 336. The Court in *Tracy* also emphasized that more than a half-century ago it had concluded that Congress itself had "exempt[ed] state regulation of instate retail natural gas sales from the dormant Commerce Clause" through the Natural Gas Act, and that in the years since that decision, Congress had "only reaffirmed the power of the States in this regard." 117 S. Ct. at 829. This recognition of local regulatory authority in the natural gas area by Congress—the ultimate arbiter of state power under the dormant Commerce Clause—finds no comparable analog in the area of solid waste disposal.

application of the balancing test and the application of strict scrutiny here.

Consistent with these authorities, the Third Circuit recognized that the State and the County Authoriies "remain free to regulate the flow of waste within New Jersey so long as the State's laws and regulations treat in-state and out-of-state facilities equally." Pet. App. 141. The County Authorities agree that the State may retain its waste flow system "as long as it adheres to non-discriminatory procurement procedures." County Authorities Pet. at 13-14. Thus New Jersey is perfectly free to continue its public utility model of regulation if it so chooses, as long as those regulations do not discriminate against interstate commerce. New Jersey's existing flow control regulations, however, require that

> those who supply disposal services at the retail level . . . secure processing and disposal services from the designated, franchised facility and out-of-state disposal firms are thus excluded not only from the market for such services during the franchise period *but also from competing for the franchise.*

Pet. App. 33-34 (emphasis added). Thus, unlike the public utility regulations that have been upheld by this Court, New Jersey's flow control regulations plainly discriminate against interstate commerce and were properly subjected to strict scrutiny by the court below.

There is also no inconsistency between *Carbone* and *Tracy*. The *Carbone* decision was predicated on a finding of discrimination against interstate commerce (*Carbone*, 511 U.S. at 391), whereas in *Tracy* discrimination was not proven. *Tracy*, 117 S. Ct. at 829-30. This critical factual distinction is what led to the application of different levels of scrutiny in *Carbone* and *Tracy*, and there is no "confusion" in the two cases.[8]

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[8] Transportation of natural gas is fundamentally different from the collection and disposal of solid waste, and is, in many respects, *sui generis*. Because natural gas can only be transported in large quantities by pipeline, the Court in *Tracy* recognized that for most

Finally, the public utility arguments raised by Petitioners do not present issues of recurring or widespread national importance. As New Jersey itself admits, "other states have not relied upon a utility model to deliver disposal services." Shinn Pet. at 15. Thus, New Jersey stands alone as the only state that comprehensively regulates solid waste disposal as a public utility on a statewide basis and the public utility issues raised by it have no significance beyond the unique factual circumstances of this case.[9] The Third Circuit has properly applied this Courts' existing precedent to these facts and there is no occasion for further review by this Court.

II. THE STATE'S CLAIM OF MARKET PARTICIPANT STATUS RAISES NO ISSUE WORTHY OF REVIEW.

Petitioners also urge review of the lower court's finding that New Jersey's waste flow regulations are not immune from Commerce Clause scrutiny under the market participant doctrine. The Third Circuit's conclusion that New Jersey is not a "market participant" was based on a solid application of this Court's market participation jurisprudence to the facts of this case and there is no need for further review.

The Third Circuit initially noted that there are "two important characteristics" present in every case where this Court has found the market participant doctrine to be

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of this century the "market structure [for natural gas sales] virtually precluded competition for LDCs and other potential [out-of-state] suppliers of natural gas for direct sales to customers. . . ." *Tracy*, 117 S. Ct. at 821. In its solid waste decisions over the past 20 years, this Court has never indicated that transportation constraints or the market structure of the solid waste collection and disposal industry precluded competition in this area. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

[9] The unique factual circumstances underlying New Jersey's solid waste regulatory scheme contrast sharply with the situation presented in *Tracy*, where the Court found that all 50 States regulate natural gas utilities. *Tracy*, 117 S. Ct. at 822 & n.10.

applicable: in each case, "the government was participating directly in some aspect of the market as a purchaser, seller, or producer, and the alleged discriminatory effects on the interstate market flowed from those market actions." Pet. App. 35. Citing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), it correctly emphasized that "[w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market." Pet. App. 38.

The Third Circuit then analyzed the facts concerning New Jersey's waste flow regulations and concluded that they simply did not fit within the market participant concept:

> The waste flow regulations purport to control the market activities of private market participants. Those regulations do not concern only the manner of operation of the government-owned or government-managed designated disposal facilities; they require everyone involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal. They do not merely determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service—even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant.

Pet. App. 39.[10]

In its Petition, the State is essentially asking this Court to overturn these factual findings with respect to the

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[10] In addition, each County Authority may choose either a "private or public entity to service its waste disposal needs." Pet. App. 112.

scope of New Jersey's waste flow regulations. But there is no reason for this Court to become involved in such a fact-intensive inquiry. In any event, the Third Circuit's findings are fully supported by the record. Although New Jersey claims that it has "removed solid waste disposal services from the commercial arena entirely by providing for those services itself," and that its system is comprised of "publicly-owned solid waste facilities" (Shinn Pet. at 14; *see also id.* at 5), the record below confirms that private firms own and operate solid waste disposal facilities, transfer stations, and recycling facilities in New Jersey,[11] and provide most of the solid waste collection and transportation services in New Jersey.[12] In recent amendments to its flow control regulations, New Jersey conceded that there are "approximately 34 public and *private* disposal facilities in New Jersey," and "approximately 500 commercial solid waste collection and transportation companies" affected by New Jersey's solid waste regulations. 29 N.J. Reg. 4170, 4179 (Sept. 15, 1997) (emphasis added). The County Authorities represent that New Jersey has "declared all solid waste collection and disposal operators in the State, both public and *private*, to be public utilities, and regulated them as such," thus implicitly admitting that New Jersey is acting as a market regulator, rather than as a market participant. County Authorities Pet. at 8 (emphasis added).[13]

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[11] (App. (1997) A-429 & A-897-899 (private disposal facilities); App. (1997) A-471 & A-789 (private transfer stations); App. (1997) A-893-94 & A-1202 (private recycling facilities).) Citations to "App. (1997) A- " in this brief refer to the joint appendix filed in the Third Circuit in connection with the second of the two appeals, which was decided by that court in 1997. This is the same citation convention used by Commissioner Shinn in his Petition for Writ of Certiorari.

[12] (App. (1997) A-357-58, A-597-98, A-1215, A-1239.)

[13] Nor is New Jersey "simply purchasing solid waste processing services with its own dollars." Shinn Pet. at 12. The State has conceded that "New Jersey local solid waste authorities are not spending their own revenues at their own facilities." (App. (1997)

The Third Circuit's conclusion that New Jersey's activities as a market regulator take it outside the ambit of the market participant doctrine is solidly grounded in this Court's prior decisions delineating the limits of the market participant doctrine. This Court has emphasized that the market participant doctrine only permits a State to impose burdens on commerce "within the market in which it is a participant, . . . [but not] outside of that particular market." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). A State cannot "immunize" its regulation of markets in which it is not a participant from Commerce Clause scrutiny. *Id.* at 99. *See also Wyoming*, 502 U.S. at 459-61 (State could require a publicly-owned utility to purchase in-state coal but could not impose the same obligations on privately-owned utilities). The Third Circuit, after a thorough analysis of the record, has concluded that the State here is acting as a market regulator with respect to private participants in the waste disposal market, and there is no need for further review by this Court.

Given the Third Circuit's findings, the State's suggestion that guidance from this Court is needed as to "whether *public* operation of a solid waste facility would fall within the ambit of the Commerce Clause" (Shinn Pet. at 13) raises an issue that is simply not presented by this case. Indeed, the Third Circuit noted that, in a previous decision, it in fact "has applied the market participant doctrine in the context of a publicly owned waste disposal facility." Pet. App. 36 (*citing Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990)). Its rejection of the State's market participant claim here was thus based squarely on its factual determinations as to the nature of New Jersey's involvement in the private waste flow mar-

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A-1240.) Rather, towns and private generators pay for disposal services at designated facilities at the non-competitive rates sustained by flow control. *Id.* at A-1239-1240. In the absence of flow control, towns and private generators could decide which disposal facilities to use based on competitive factors. *Id.* at A-1239.

ket, and not on any notions as to the applicability of the Commerce Clause to public facilities.

The State effectively claims to be a "market participant" in any transaction in which a private generator of waste located in New Jersey hires a private hauler to transport waste to a private disposal facility. But this theory would effectively rewrite this Court's holdings regarding the market participant doctrine so that the exception "swallow[s] up the rule" prohibiting discrimination against interstate commerce. *See South-Central Timber*, 467 U.S. at 98. This Court in *Carbone* rejected similar efforts of *amici* to characterize the town's activities as market participation,[14] concluding that the ordinance at issue there was "just one more instance of local processing requirements that we long have held invalid." *Carbone*, 511 U.S. at 391 (citations omitted). This same observation is equally true here.

This Court has squarely rejected efforts by litigants to expand the market participant exception to traditional government regulatory functions. *See Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1606-07 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988). This case represents yet another such effort. Here, the State is using its distinctive governmental powers to regulate the market for collection, transportation, and disposal of solid waste. This is the antithesis of market participation.

Finally, the County Authorities—but not the State—contend that a conflict exists between Second Circuit and Eleventh Circuit decisions regarding the applicability of the market participant exception to flow control cases, specifically *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996), and *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala.

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[14] Brief of *Amicus Curiae* City of Springfield, Missouri in Support of Respondent at 25-26 (Aug. 23, 1993), *C & A Carbone, Inc. v. Town of Clarkstown* (No. 92-1402).

1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994). But the point of disagreement in those cases involved the application of the market participant doctrine to a voluntary contractual arrangement between a town and a contractor, not to discriminatory regulations, like those here. *Smithtown*, 66 F.3d at 514-18; [15] *Waste Recycling*, 814 F. Supp. at 1570, 1575-77. In any event, the alleged conflict between *Smithtown* and *Waste Recycling* could have been addressed by reviewing the Second Circuit's decision in *Smithtown*, but the Court declined to grant certiorari in that case.[16]

III. THE THIRD CIRCUIT'S CONCLUSION THAT PETITIONERS HAD FAILED TO JUSTIFY A TWO-YEAR POST-APPEAL STAY OF THE INJUNCTION AGAINST ITS UNCONSTITUTIONAL REGULATIONS PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT.

The State also asks this Court to review the Third Circuit's conclusion that the two-year post-appeal stay issued by the district court was improper.[17] The State frames the issue on appeal as whether the Third Circuit "err[ed] in finding that there was no federal judicial discretion remaining under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)," that would support a stay in this case. Shinn Pet. at i.

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[15] Indeed, in *Smithtown*, the court declined to apply the market participant exception to a discriminatory flow control ordinance similar to the ordinance and regulations invalidated in *Carbone* and in the decisions below. *Id.* at 512-13.

[16] The County Authorities also point to district court decisions that they contend are inconsistent with the Third Circuit's decisions in this case. County Authorities Pet. at 13-14. Conflicts for purposes of this Court's review do not result from inconsistencies between district court and Circuit Court decisions, and thus there is no occasion for granting certiorari on this ground.

[17] The County Authorities join in the State's argument, but do not argue the post-appeal stay issue separately. County Authorities Pet. at 18 n.4.

The short answer is that this is not what the Third Circuit found. Contrary to the State's contention, the Third Circuit did *not* decide categorically that federal courts lack discretion in the remediation phase of constitutional litigation, but only that such discretion may not be exercised when "the impact of the injunction is solely economic." Pet. App. 151.

Respondents argued below that this Court's recent retroactivity decisions in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), eliminated equitable discretion to postpone constitutional relief and compelled reversal of the two-year post-appeal stay. As in its Petition, the State argued that equitable discretion could still be exercised under *Chevron Oil*. *See* Shinn Pet. at 21. The Third Circuit explicitly refrained from deciding these retroactivity questions, stating: "We need not decide any of these retroactivity questions in this case." Pet. App. 151 (footnote omitted).

Instead, the court below resolved the stay issue on the specific facts of this case, holding:

> Even if we consider all of the State's justifications for a stay, we must conclude that they are insufficient to establish that a two-year post-appeal stay is an appropriate remedy for the constitutional violation involved here.

Id. at 151. It left open the possibility that a post-appeal stay might be sustained in an appropriate case, but found that this was not such a case:

> Whatever the district court's power may be to delay constitutional relief, none of the justifications raised by the defendants support the extraordinary act of delaying the injunction of an unconstitutional law.

Id. at 143 (footnote omitted).[18]

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[18] The court below further noted that the district court had issued its post-appeal stay "without developing a record. This alone com-

New Jersey raised three arguments to support the two-year post-appeal stay: first, administrative difficulties, (Pet. App. 144); second, environmental and health concerns (*id.* at 145-46); and third, the financial cost of eliminating flow control to comply with the Constitution. *Id.* at 146. The Third Circuit properly rejected each of those arguments.

The court below found no support for the post-appeal stay based on administrative difficulties, because the injunction "extends no further than N.J.A.C. § 7:26-6.5[,] . . . [and] leaves the bulk of New Jersey's waste disposal system in place. . . ." Pet. App. 144. The State and the County Authorities "have all the tools necessary to bring their waste disposal system within the ambit of the Commerce Clause." *Id.* at 145.

In fact, New Jersey recently used its regulatory powers to publish "emergency regulations" to replace its discriminatory flow control measures. 29 N.J. Reg. 4170, 4171-90 (Sept. 15, 1997). The State's issuance of these regulations confirms that the decision below was correct. The new regulations "delete the sections found unconstitutional by the [Third Circuit] as well as those sections rendered unnecessary by the repeal of waste flow . . . [and] add provisions facilitating the procurement of services in a non-discriminatory manner. . . ." *Id.* at 4171.[19]

Promulgation of these new regulations utterly defeats New Jersey's claim that the discriminatory flow control regulations cannot be "surgically removed from the body of regulations without significant repair to that which remains. . . ." Shinn Pet. at 22-23. New Jersey has performed the required surgery, as well as whatever repair

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pels us to vacate the stay as an abuse of discretion." Pet. App. 143 n.22.

[19] The deletion of the enjoined provision N.J.A.C. § 7:26-6.5 and other regulations "shall become operative as of the date of final disposition" of this case. 29 N.J. Reg. 4170, 4175.

it deemed necessary, with issuance of the emergency regulations. Adoption of these regulations proves that the absence of a stay will not result in the " 'grave disruption and inequity' " that New Jersey claims. *Id.* at 29 (citation omitted).

The Third Circuit also rejected the environmental and public health justifications for the post-appeal stay, since the injunction does not affect the provisions of New Jersey's regulatory scheme that address environmental and health concerns. Pet. App. 145-46. This Court in *Carbone* recognized that, even without flow control regulations, there are "any number of nondiscriminatory alternatives for addressing the health and environmental problems" associated with solid waste disposal—the most obvious being "uniform safety regulations enacted without the object to discriminate." *Carbone*, 511 U.S. at 393. A post-appeal stay was not deemed necessary in *Carbone* to facilitate the adoption of such regulations, and the lower court correctly concluded that none is required here, especially in light of New Jersey's demonstrated ability to promulgate amended solid waste regulations expeditiously.

The court below correctly concluded that the financial impact of remedying a constitutional violation does not justify the withholding of relief for the infringement of constitutional rights. Pet. App. 146-49. In doing so, the Third Circuit relied on this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), which held that a "State's interest in financial stability does not justify a refusal to provide relief." *Id.* at 501. As the court below concluded:

> Just as 'revenue generation is not a local interest that can justify discrimination against interstate commerce[,]' revenue generation in and of itself cannot justify court ordered perpetuation of an unconstitutional law.

Pet. App. 149 (*quoting Carbone*, 511 U.S. at 393).

Finally, federalism and separation of powers issues are not implicated by reversal of the two-year post-appeal stay. The court below did what courts are supposed to do: it enjoined the State from enforcing administrative regulations that it has found unconstitutional and from " 'implementing New Jersey's self-sufficiency policy . . . by abrogating existing valid contracts or rejecting or foreshortening contracts' " submitted for review by state authorities. Pet. App. 152-53 (citation omitted).[20] The State's premise for its federalism and separation of powers argument—that the Third Circuit's decision requires the New Jersey Legislature to fashion a remedy by "revamping New Jersey's solid waste program" (Shinn Pet. at 26; *see also id.* at i)—is untenable. The Third Circuit's decision does not require New Jersey to take any legislative action to comply with the injunction, but simply requires it to stop enforcing unconstitutional regulations and to stop implementing its discriminatory self-sufficiency policy by interfering with contracts.[21] Because no legislative action is necessitated by the Third Circuit's decision, this case raises no issue of federalism or separation of powers.

Finally, it has been three years since *Carbone* was decided by this Court, establishing the rule of law which governs this case. Three years has given New Jersey more than enough time to bring its solid waste regulations into compliance with *Carbone*, if it had chosen to do so. The Third Circuit properly concluded that, on the facts of this case, New Jersey had offered no valid justification for delaying the effective date of the injunction against enforcement of its unconstitutional flow control regulations. This essentially factual determination has no impact be-

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[20] The remaining provisions of New Jersey's solid waste statutes and regulations are not affected by the injunction. Pet. App. 153.

[21] Although the exercise of legislative functions may be necessary to correct unconstitutional conditions found to exist in state institutions, such as public schools or prisons, this is not such a case.

yond this particular case, and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH TORRE
TORRE & TORRE
456 Boulevard
Hasbrouck Heights, NJ 07604
(201) 935-7110

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
WILLIAM T. HASSLER
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

October 9, 1997

Nos. 97-400 & 97-430

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,

Petitioners,

vs.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., *et al.*,

Respondents.

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,

Petitioner,

vs.

ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,

Respondents.

On Petitions for Writ of Certorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ATLANTIC COAST DEMOLITION & RECYCLING, INC.

MARK R. ROSEN
Counsel of Record
MESIROV GELMAN JAFFE
CRAMER & JAMIESON
Attorneys for Respondent Atlantic Coast Demolition & Recycling, Inc.
Woolcrest Pavilion
Ten Melrose Avenue
Chery Hill, NJ 08003-3647
(609 795-4988

30 pp

LIST OF PARTIES

Respondent accepts the list of parties submitted by petitioners.

LIST OF PARENT AND RELATED CORPORATIONS

At the commencement of this action, Atlantic Coast Demolition & Recycling, Inc. was a wholly owned subsidiary of United Waste Systems, Inc., a public company. During the pendency of this litigation, Atlantic Coast was sold to private owners by United Waste; however, United Waste retained an interest in the outcome of this litigation. Another public company, USA Waste Services, Inc., subsequently acquired United Waste as its wholly-owned subsidiary, and as a result has succeeded to United Waste's interests in this litigation.

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I

Respondent Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") respectfully requests that this Court deny the petitions for writ of certiorari filed by petitioners Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and Passaic County Utilities Authority ("County Authorities") and by petitioner Robert C. Shinn, Jr., the Commissioner of the New Jersey Department of Environmental Protection ("New Jersey" or "the State"), seeking review of the Third Circuit's decisions in this case. Those opinions are reported at 48 F.3d 701 (3d Cir. 1995) and 112 F.3d 652 (3d Cir. 1997).

STATEMENT OF THE CASE

This four year old litigation concerns the constitutional validity of a single set of New Jersey regulations, N.J. Admin. Code. tit. 7, § 26-6.5, *et seq.*, directing where all solid waste generated in the State by public or private parties must be processed and disposed. In 1993, Atlantic Coast, a Pennsylvania corporation which operates a transfer station and a center for processing, recycling and disposing of construction and demolition ("C&D") waste in Philadelphia, commenced this action in the United States District Court for the District of New Jersey. Atlantic Coast's suit sought declaratory and injunctive relief halting enforcement of New Jersey's "flow control" regulations, which kept it from gaining entrée into the market for processing C&D waste originating in New Jersey, on the ground that these regulations violate the dormant Commerce Clause of the United States Constitution. Pet. App. 3-4, 15-16.[1]

Under the "flow control" system, each of the 22 districts in the State was required to develop a ten-year solid waste

1. The appendices filed by New Jersey and the County Authorities contain the same materials in the same order, so Atlantic Coast shall simply cite to these materials as "Pet. App. __".

management plan, providing for "sufficient suitable" disposal facilities to treat and accommodate all solid waste generated within that district, either by contracting with public or private entities or by constructing and operating their own waste facilities. Each waste management plan, which is subject to approval or disapproval by the Commissioner of DEP, must designate where the waste generated within each municipality in that district will be processed and ultimately disposed. In addition, each processing or disposal facility is subject to state regulation, including registration and approval by the Department of Environmental Protection ("DEP") and issuance of a certificate of public convenience and necessity by the Board of Regulatory Commissioners. Only those facilities included in a district plan can receive operating permits or accept waste from that district. These designations are then codified as the "waste flow" regulations, which permit DEP and the individual districts to direct the flow of waste generated within each municipality in each district. N.J. Admin. Code. tit. 7, § 7:26-6.5. Pet. App. 8-12.

DEP candidly admitted that its twin "goals of 60% recycling and disposal self-sufficiency for the nonrecyclable waste stream . . . form the core of New Jersey's current solid waste management system and constitute the statewide solid waste management objectives, criteria and standards with which the [district] plans must be consistent." Accordingly, the district court found:

> . . . the D.E.P.E. administers the law with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state. The 1993 solid waste management state plan update, which was admitted into evidence and herein referred to as the Update, provides: "As a move toward achievement of

> self-sufficiency in disposal capacity. The Department's objective is to eliminate reliance on out-of-state disposal within a seven-year period."

Pet. App. 13-14.

Before bringing this action, Atlantic Coast sought to gain access to the New Jersey market for processing and disposal of C&D waste, but was unable to gain access to any district "flow control" plan because it was located out-of-state. Pet. App. 17.

The district court originally judged Atlantic Coast's Commerce Clause claims under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and, after conducting an evidentiary hearing, entered judgment in favor of defendants. Atlantic Coast then appealed.

While its appeal was pending, the Supreme Court handed down its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *Carbone* arose from a similar flow control ordinance in Clarkstown, and the Court concluded that the Clarkstown ordinance discriminated against interstate commerce by hoarding solid waste and the demand for its disposal. 511 U.S. at 392. Therefore, *Carbone* held that its constitutionality must be judged under the virtually *per se* invalid test of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which shifted the burden to the government to demonstrate, under rigorous scrutiny, that the discriminatory program was the only means to serve a legitimate, nondiscriminatory interest. 511 U.S. at 392. *Carbone* further rejected all of the rationalizations proffered by Clarkstown, including environmental and financial considerations, and concluded that Clarkstown's "flow control" ordinance did not pass strict scrutiny and was unconstitutional. 511 U.S. at 393-94.

On that appeal (*Atlantic Coast I*), the Third Circuit noted that this Court's decision in *Carbone* "provides significant guidance" in considering Atlantic Coast's then pending appeal, and observed that "New Jersey's flow control regulations accomplish on a district level substantially what Clarkstown's flow control ordinance accomplished on a local level." Pet. App. 22, 27. Reviewing the factual record from the district court, the court of appeals:

> conclude[d] that New Jersey's waste flow regulations, in effect and by design, discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required.

Pet. App. 20.

The Third Circuit further considered and rejected DEP's arguments "that New Jersey's regulation of waste disposal through a utility system requires application of the less stringent balancing test" and "that New Jersey is entitled to the market participant exception." Pet. App. 20, 29-39.

The court of appeals then decided that because the district court had decided the case under the Pike balancing test and had no occasion to apply the much stricter *Philadelphia v. New Jersey* test, it remanded the case to the district court to determine whether the government had accomplished "the much more onerous task of demonstrating that there is no alternative to its waste flow control regulations that would accomplish its legitimate objectives," and left to the district court's initial discretion whether to resolve the case on the basis of the current "very substantial record" or to reopen the record to receive additional evidence. Pet. App. 40-42.

On remand, the Atlantic Coast litigation was consolidated with another challenge to the New Jersey "flow control" regulations brought by C & A Carbone, Inc., the National Solid Wastes Management Association and the Waste Management Association of New Jersey ("Carbone plaintiffs"), as well as other parties who were subsequently dismissed from the litigation. The district court also granted the defendants' request to reopen and expand the record, and substantial additional evidentiary submissions were made.

The district court then conditionally, Pet. App. 182-218, and later unconditionally, Pet. App. 219-247, granted Atlantic Coast's renewed motion for a preliminary injunction against enforcement of the "flow control" regulations for C&D waste, while denying certain Carbone plaintiffs' motion to preliminarily enjoin these regulations for all types of solid waste. On July 15, 1996, following a trial on the merits, the district court found:

> Defendants have not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests . . . as well or better than the current flow control regulations. Indeed, defendants have not even attempted to present a feasible nondiscriminatory alternative to the Court . . .

Pet. App. 272. The district court therefore concluded that "New Jersey's system of flow control of waste violates the Commerce Clause of the United States Constitution" and made its preliminary injunction against the enforcement of "flow control" for C&D waste permanent. In addition, it issued a permanent injunction against enforcement of "flow control" for the remainder of the solid waste stream but, unlike its treatment of C&D waste, the district court stayed enforcement of the non-

C&D injunction until two years after the case is no longer subject to appeal or pending review by the Supreme Court.

New Jersey and the County Authorities appealed the portion of the district court's decision finding that the "flow control" regulations were unconstitutional, and the Carbone plaintiffs appealed the district court's post-appeal stay.[2] On that appeal (*Atlantic Coast II*), the court of appeals affirmed the district court's application of the strict scrutiny standard to the New Jersey "flow control" regulations, as well as its factual finding that the defendants did not meet their burden of demonstrating that there were no nondiscriminatory alternatives for achieving its legitimate interest in creating a safe and effective system for in-state solid waste disposal, and, therefore, affirmed the district court's conclusion that the New Jersey "flow control" regulations are unconstitutional. Pet. App. 108, 125-134, 138. The court of appeals, however, reversed the district court's two year post-appeal stay, Pet. App. 143, which did not apply to the permanent injunction barring enforcement of "waste flow" for C&D waste, Pet. App. 291-293.

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari will be granted "only for compelling reasons." Sup. Ct. R. 10. A review of the actual factual record and procedural history of this case should establish that the petitions do not present any grounds for granting certiorari as set forth in Rule 10, and the court of appeals correctly decided the issues in this case. Therefore, Atlantic Coast respectfully submits that this Court deny the petitions for writ of certiorari.

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2. Because Atlantic Coast only processes C&D waste, and the injunction for C&D waste was *not* stayed, Atlantic Coast was not a party to the Carbone plaintiffs' appeal to the court of appeals on the issue of the stay, and can take no position on New Jersey's petition for certiorari on that matter (Point III).

I.

PETITIONERS HAVE CONCEDED THAT THE CIRCUMSTANCES OF THIS CASE ARE "UNIQUE".

In accordance with Rule 10, one of the factors the Court may consider in deciding whether to grant review is whether the decision below raises issues important to the public, and not merely the particular parties involved in the litigation. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). In weighing the petitioners' claims concerning the importance of the issues, it should be noted that both the County Authorities and New Jersey have consistently, and repeatedly, represented to the courts that New Jersey's system of solid waste management, is unique and fundamentally different from the laws and regulations applied in the other 49 states.

Contrary to the suggestion in the County Authorities' petition for certiorari that "[r]eview of the decision below will afford New Jersey, *and its numerous similarly situated sister States*, the guidance that is so conspicuously lacking in the current case law,"[3] the County Authorities previously sought to distinguish this case from this Court's decision in *Carbone*, by stressing how each Commerce Clause case is fact-intensive and emphasizing the "unique" circumstances here which prevented this case from being controlled by other precedents:

> . . . nothing in the *Carbone* decision reverses the Supreme Court's long-standing position that a Commerce Clause analysis turns upon the factual record established in each case

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3. *County Authorities Pet.* at 18 (emphasis added).

by the Federal District Court. In this matter, the District Court's September 8, 1993 decision is premised upon an *extensive factual record and numerous factual findings* relative to the nature of New Jersey's solid waste management system and its Waste Flow Regulations. As reflected in that record and the lower Court's findings, New Jersey's solid waste management system and Waste Flow Regulations are premised upon *unique factual circumstances* (1) readily distinguishable from those in place in Clarkstown, New York, and (2) having recognized constitutional significance in the context of a Commerce Clause analysis.

* * *

As reflected in its statutes, regulations, the record on appeal and the findings of the Court below, New Jersey's solid waste management system — including its Waste Flow Regulations — are *unique* . . . . the New Jersey Legislature established a *unique* and comprehensive approach to the management of solid waste collection and disposal.

* * *

The State of New Jersey has a long history of regulating solid waste collection and disposal as regulated public utilities. In this regard, *its utility control system is unique among the fifty states.*

Brief on Behalf of Potential Intervenors/Amici Curiae Hudson County Improvement Authority, Passaic County Utilities Authority, and Essex County Utilities Authority in Opposition to Motion for Summary Reversal at 2, 4, 15 (3d Cir. filed June 16, 1994) (emphasis added).[4]

New Jersey similarly stressed the uniqueness of its regulatory system in distinguishing its situation from that of all other states. *New Jersey Pet.* at 5, 14. This followed the State's arguments in the court of appeals emphasizing the unique, rather than common issues, presented by this case.[5]

Having previously represented that the New Jersey system regulating waste disposal arose from, and must be judged in light of, the unique and distinguishing facts of that case, this Court may view with skepticism petitioners' claim that New Jersey's regulatory system is typical or emblematic of the

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4. After the filing of this amici brief, the remaining county authority petitioning for certiorari here — Mercer County Improvement Authority — moved for, and by Third Circuit Order dated August 15, 1994, was granted leave to, participate in the litigation through the same brief and potential argument presented by the other three county authorities.

5. *See Brief of Appellee Commissioner New Jersey Department of Environmental Protection and Energy in Opposition to Appellant's Motion for Summary Action and in Support of Cross-Motion for Acceleration and Stay*, No. 94-5173 (3d Cir. filed June 13, 1994) ("New Jersey's system of solid waste management may be the most comprehensive in the nation. *It stands apart as well due to New Jersey's long and almost unique, history of regulating the solid and hazardous waste industries as public utilities.* The constitutionality of the system cannot be determined without an understanding of this complexity because Commerce Clause analysis turns on the specific purpose, effect and benefit of the provision challenged.") (emphasis added, citations and internal quotation marks omitted); *Merits Brief of Defendant-Appellee Commissioner New Jersey Department of Environmental Protection*, No. 94-5173 (3d Cir. filed July 18, 1994) (same).

treatment of solid waste by other states and that the Third Circuit's rulings following *Carbone* have some special significance going far beyond the borders of that circuit.[6] *See generally Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) (judicial estoppel may prevent litigants from knowingly asserting inconsistent or mutually contradictory positions).

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6. In fact, the decisions in *Atlantic Coast* do not necessarily mandate the end of flow control even within the boundaries of the Third Circuit. As the court of appeals explained in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1265 (1996), it did not read either *Carbone* or *Atlantic Coast I* as establishing a *per se* ruling subjecting *all* flow control ordinances to strict scrutiny. *Harvey & Harvey*, 68 F.3d at 800-802.

Applying its fact-driven analysis for discriminatory purpose or effect, the *Harvey & Harvey* Court overturned one district court's determination that the Chester County, Pennsylvania flow control scheme did not discriminate against interstate commerce and therefore must be measured under the Pike balancing test, while overturning another district court's finding that the Mercer County, Pennsylvania flow control scheme did discriminate against interstate commerce and thus should be judged under the virtually *per se* invalid test of *Philadelphia v. New Jersey*. In fact, the court of appeals explained that a local authority could choose a single provider without impermissibly discriminating against interstate commerce *provided* that the selection process was truly open and competitive and offered truly equal opportunities to in-state and out-of-state businesses. 68 F.3d at 802.

Of course, the problem for petitioners here is that in *Atlantic Coast I* the court of appeals expressly found that New Jersey's designation process was not truly open and competitive, but was intended to favor operators that have facilities already located within, or those that are willing to construct a facility within, the State, and given the State's core goal of waste attaining self-sufficiency, out-of-state facilities do not compete on anything approaching a level playing field. *Atlantic Coast I*, 48 F.3d at 708, 713, 715; *Harvey & Harvey*, 68 F.3d at 800-801.

II.

PETITIONERS HAVE NOT ESTABLISHED AN INCONSISTENCY WITH THIS COURT'S DECISIONS OR CONFLICT WITH OTHER CIRCUIT COURT DECISIONS WARRANTING REVIEW.

An alternative ground for granting certiorari is the existence of an inconsistency or conflict between the decision for which review is sought and either a Supreme Court or another final appellate court decision. Sup. Ct. R. 10. However, as the commentators have explained:

> [t]his means that there must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.

Robert L. Stern, et al., *Supreme Court Practice* 167 (7th ed. 1993).

Petitioners attempt to qualify for certiorari here by misconstruing the decisions to create a substantial conflict where none exists.

A. There Is No Inconsistency Between the *Atlantic Coast* Decisions and This Court's "Utility" Cases.

New Jersey suggests that the court of appeals' determination that the State's "flow control" regulation is unconstitutional because it discriminates against interstate commerce improperly "ignored this Court's decisions in the public utility field," citing *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951), and *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997). *New Jersey Pet.* at 17. According

to the State, the decision to implement its "flow control" system as part of a program regulating certain aspects of the waste industry as public utilities, has served to dilute the constitutional standards against which its "flow control" decisions should be scrutinized. Rather than follow the principles laid down by this Court in *Carbone*, the State contends that these cases mandate the use of the Pike balancing test, regardless of the facts of this particular case. Yet on closer examination, a review of these Supreme Court decisions reveals that there is nothing in this Court's Commerce Clause jurisprudence inconsistent with the Third Circuit's decision to apply *Carbone*'s strict scrutiny test, based upon its finding of proven discrimination:

> we do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

Pet. App. 29.

More than once in recent years this Court has declared that state utility regulation is "not treated as a special province insulated from our general Commerce Clause jurisprudence." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983); *General Motors Corp. v. Tracy*, 117 S. Ct. at 820 n.8 (quoting and following *Arkansas Electric*). Furthermore, this Court has consistently decided whether to apply a heightened scrutiny test to Commerce Clause challenges to utility regulations based upon whether it did or did not find discrimination against interstate commerce. *Panhandle Eastern*, 341 U.S. at 336-37 (found no discrimination

against interstate commerce, noting that state statute under which state utility commission acted "does not distinguish between an interstate or intrastate agency desiring to operate in a locality served by a utility"); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 (1982) (state utility commission order prohibiting sales of power outside the state struck down under *Philadelphia v. New Jersey* standard as unconstitutional protectionist regulation); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992) (Oklahoma statute requiring in-state utilities to purchase at least 10% Oklahoma-mined coal discriminates against interstate commerce and so will be struck down under virtually *per se* rule of invalidity); *General Motors*, 117 S. Ct. at 828 n.15 (while finding no discrimination under the facts of the case, warning "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny, even if it is directed toward a legitimate health and safety goal," citing *Philadelphia*).

In view of both the district court's findings that DEP acts "with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state" and a "key policy objective" is to "move toward achievement of self-sufficiency in disposal capacity" and "to eliminate reliance on out-of-state disposal" within seven years from 1993, Pet. App. 14, 74, and the court of appeals' determination that this policy of self-sufficiency "has favored operators that have facilities within the state or that are willing to construct a facility there," Pet. App. 113, the conclusion that New Jersey's "flow control" system discriminates against interstate commerce cannot be seriously disputed. Pet. App. 15. Accordingly, the application of the strict scrutiny test, rather than the Pike balancing test was clearly consistent with this Court's Commerce Clause jurisprudence and the factual record in this case.

Similarly, the County Authorities' contention that the Court should grant certiorari to resolve "a latent, but nationally significant, conflict" between *Carbone* and *Tracy*, *County Authorities Pet.* at 12, reflects a disregard of this Court's assessment of the question of discrimination in the two cases. In *Carbone*, the Court expressly found discrimination in the "flow control" ordinance and thus applied the heightened scrutiny test. 511 U.S. at 391. This contrasts sharply with the situation in *Tracy* where the claim of discrimination was not proven, but, if established, would have resulted in "a high level of judicial scrutiny," 117 S. Ct. at 828-830 & n.15. It is this factual difference, and not any conflict between the legal reasoning in these two decisions, which accounts for their different outcomes.

Moreover, *Tracy* arose from close to a half-century of state regulation of retail sales of natural gas, which had never been questioned by Congress. 117 S. Ct. 816, 820-22, 827, 829. There has been no equivalent legislative authorization for state-imposed regulation of "flow control." *See Carbone*, 511 U.S. at 407-410 (O'Connor, J., concurring). Thus, while the State may elect to continue to regulate solid waste disposal if it so desires, it must do so in a manner which does not discriminate against interstate commerce.

B. New Jersey's Contention that its Actions Were Immunized Under the Market Participant Doctrine Is Supported by Neither the Facts Nor the Law.

New Jersey also contends that the court of appeals erred in not finding that the State's entire "flow control" scheme is immunized from any constitutional scrutiny under the market participant doctrine. This argument reflects a disregard of both the legal principles and the evidence in the record supporting the court of appeals' decision that New Jersey simply is not

acting as a market participant when it issues its "flow control" directives regulating who may and may not process and dispose of solid waste generated by private businesses and residences and public entities in each district.

In rejecting this defense, the court of appeals explained in *Atlantic Coast I* that in each case where this Court found the market participant doctrine applicable,[7] the government was participating directly in some aspect of the market as a purchaser, seller or producer, and the alleged discriminatory effects on the interstate market flowed from these market actions. Pet. App. 35. The court of appeals then explained that, under this doctrine, a governmental entity which enters the market "may buy or sell what it chooses, to or from whom it chooses, on terms of its choice," but that its participation in the market "does not, however, confer upon it the right to use its regulatory power to control the *actions of others in that market*." Pet App. 38 (emphasis added). The constitutional problem with New Jersey's "flow control" system is that the districts were not limiting their intervention in the market to making choices about the terms under which they were willing to provide waste disposal services to the market. Instead, "[t]he waste flow regulations purport to control the market activities of private market participants" and "require *everyone* involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal." Pet. App. 39 (emphasis added). In issuing these "flow control" regulations, the governmental entities were acting as market regulators, not market participants, Pet. App. 39, thereby losing any immunity from constitutional scrutiny.

In applying this test, the court of appeals was simply following this Court's well-trodden path. *See South-Central Timber*

7. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Workers*, 460 U.S. 204 (1983).

Development, Inc. v. Wunnicke, 467 U.S. 82, 97-98 (1984) ("[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, *but allows it to go no further*. . . . Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule") (emphasis added); *Wyoming v. Oklahoma*, 502 U.S. 437, 459-61 (1992) (State could require state-owned utility, but not privately-owned utilities to purchase coal mined in-state). Nothing cited by the State suggests that a different test should be applied to determine the scope of this doctrine here.

The State does attempt to circumvent these requirements by ignoring or misstating the factual record. It glibly suggests that "New Jersey has removed solid waste disposal services from the commercial arena entirely by providing for those services itself" and "New Jersey is simply purchasing solid waste processing services with its own dollars" *New Jersey Pet.* at 5, 12, citing App. (1995) A-510. Neither statement is supported by the record.

As the State's own Solid Waste Management Plan Update 1993-2002 (1993), issued only months before the commencement of this litigation, states:

> Although the development and implementation of solid waste programs and facilities traditionally has been a public function, the role of the private sector in achieving the policy objectives set forth in this State Plan Update cannot be underestimated. Currently, private companies perform the majority of solid waste collection and disposal functions in the state, including ownership and operation of recycling centers, transfer stations, materials recovery facilities, landfills and incinerators.

App. (1995) A-513.[8] As recently as last month, New Jersey issued a notice of amendments adopted and proposed in response to the anticipated final invalidation of "flow control" estimating that there are approximately 500 commercial solid waste collection and transportation companies affected by its waste disposal rules. 29 N.J. Reg. 4170, 4179 (Sept. 15, 1997).

Nor does the record support New Jersey's claim that the State is simply purchasing solid waste processing services with its own funds. *New Jersey Pet.* at 12. Waste processing services are purchased and paid for by countless private concerns, including "almost 3,000" businesses, such as construction companies registered with the DEP as "self-generators" of waste, as well as hundreds of municipalities. App. (1997) A-357-59.

In short, this is simply not the situation found in *Smithtown*, and the market participant doctrine does not apply to the State's clear regulatory actions determining "waste flow" for all solid waste generated by private or public parties.

C. There Is No Genuine Conflict Between the *Atlantic Coast* Decisions and the Decisions of Other Circuit Courts.

Finally, the County Authorities contend that certiorari should be granted because:

> [i]n the wake of *Carbone*, courts throughout the country have been confronted, if not inundated, with dormant Commerce Clause challenges to state and local waste programs [and] [t]o date, nothing remotely approaching

8. *See also* App. (1997) A-429, 897-899 (private disposal facilities); A-471, 789, 1229 (private transfer stations); A-893-94, 1202 (private recycling facilities); A-357-58, 597-98 (solid waste collection and transportation).

> a consensus on *Carbone*'s meaning and effect has been reached.

County Authorities Pet. at 13.

However, an essential prerequisite to granting certiorari based upon a conflict is that *the decision for which review is sought* is shown to be inconsistent with a Supreme Court decision or in conflict with another final appellate court decision, *see, e.g., Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994). And none of the appellate court cases cited by the County Authorities, *Harvey & Harvey*, 68 F.3d at 802; *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419, 1452 (1996), conflicts with the court of appeals' decisions they seek to review here. Instead, the County Authorities engage in a general discussion pointing out real or perceived differences among various circuit or district court opinions, none of which present a direct conflict with the Third Circuit's decisions in *Atlantic Coast. County Authorities' Pet.* at 13-17.[9]

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9. The County Authorities are misrepresenting the caselaw when they characterize the decision in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1384-85 (8th Cir. 1997), as "taking note of the Third Circuit view, but declining to embrace or reject it." *County Authorities Pet.* at 14. In fact, *Oehrleins* neither referred to the decisions in this case nor stated any disagreement with their rulings. Rather, *Oehrleins* simply noted the principle from *Harvey & Harvey* that where there is a neutral, nondiscriminatory process for designating facilities, the waste management law may not violate the Commerce Clause, even if it results in the designation of an exclusive in-state facility. However, the reason why the Eighth Circuit did not decide the validity of this premise is that it found that the initial designation process in *Oehrleins* simply was not open. Its decision certainly does not rise to the level of a conflict, let alone a serious conflict between the circuits warranting Supreme Court review.

Harvey & Harvey, which was decided by the Third Circuit between *Atlantic Coast I*, 48 F.3d 701 (3d Cir. 1995), and *Atlantic Coast II*, 112 F.3d 652 (3d Cir. 1997),[10] did not conflict with either decision in this case. Rather, *Harvey & Harvey* reviewed the caselaw, including *Carbone* and *Atlantic Coast I*, and distilled the relevant principles governing Commerce Clause challenges to flow control laws, explaining that whether a flow control law is subject to strict scrutiny or the Pike balancing test depends upon a review of the facts showing actual discrimination against interstate commerce. 68 F.3d at 798-801.

SSC Corp. v. Town of Smithtown also is essentially consistent with the decisions striking down the flow control directives here. *Smithtown* involved a challenge to not one but two acts taken by that municipality: (1) a flow control ordinance requiring all residential and commercial garbage generated in that town to be disposed of at the incinerator, where Smithtown charges tipping fees based on the amount of waste dumped; and (2) the creation of a residential garbage collection district which entered into a contract with private haulers to pick up all household waste within the district. *Smithtown*, 66 F.3d at 505. Atlantic Coast has not challenged any contract whereby a municipality picks up all household or municipal waste, so the second issue

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10. Of course, because *Harvey & Harvey* and *Atlantic Coast I* and *Atlantic Coast II* were all decided by the Third Circuit, any purported conflict among these decisions, even if genuine, would not normally constitute a sufficient basis for granting certiorari. *See generally Davis v. United States*, 417 U.S. 333, 340 (1974). Such disagreements, if real, will not be considered to present a reviewable conflict, since any differences are deemed an intramural matter to be resolved by that circuit court itself through en banc panels, *see Jeremy H. By Hunter v. Mount Lebanon School District*, 95 F.3d 272, 280 n. 14 (3d Cir. 1996), or the practice of later panels following decisions of earlier panels, Third Circuit Internal Operating Procedure 9.1; *United States v. Conley*, 92 F.3d 157, 168 & n. 9 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1244 (1997); *Supreme Court Practice* at 177.

in *Smithtown* has no parallel here. However, the first action — Smithtown's enactment of a flow control law enforceable by criminal fines and imprisonment — raised the same general issues as the present case and produced the same outcome. The Second Circuit concluded that the flow control law "clearly constitutes municipal regulation of the waste disposal market, not participation in that market, thus subjecting the ordinance to Commerce Clause scrutiny," and following *Carbone*, concluded that it impermissibly discriminated against interstate commerce and therefore was unconstitutional. *Smithtown*, 66 F.3d 506, 512-514. In addressing the question of the "market participation" doctrine, which is given central importance in the certiorari petitions, the Second Circuit's decision in *Smithtown* expressly reviews and "agree[s] with the Third Circuit" in its formulation of that doctrine in *Atlantic Coast I*. 66 F.3d at 512-513. [11]

USA Recycling, Inc. v. Town of Babylon, which was decided on the same day and by the same Second Circuit panel which decided *Smithtown*, presents no conflict of any kind with the decisions in *Atlantic Coast*. In *Babylon*, the Second Circuit ruled that a municipal decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the strictures of the Commerce Clause because it constitutes market regulation, not market participation, because no private actor could engage in such activity, and added that:

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11. Moreover, the decision in *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without pub. op.*, 29 F.3d 641 (11th Cir. 1994), does not constitute a circuit court decision conflicting with the Second Circuit's decision in *Smithtown*. Because the only *reported* decision was by the district court, which was affirmed in an unreported decision not even considered binding precedent in its own circuit, *see* 11th Cir. R. 36-2, this decision must be considered a district, not circuit court opinion, and certainly not one giving rise to a serious conflict between the circuits.

> states and local governments do not enjoy carte blanche to regulate a market simply because they also participate in that market.

Babylon, 66 F.3d at 1282.

It added, however, that the town's decision to eliminate the commercial collection market and replace it with a contractor selected after an open bidding process in which the town aggressively solicited bidders on a national basis did not constitute discrimination against interstate commerce.[12] Therefore, its actions were subject to constitutional review, and passed scrutiny, under the Pike balancing test. 66 F.3d 1283-84, 1290. The Second Circuit explained:

> Babylon's waste management plan . . . differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this court in *SSC Corp.* In both of those cases, the challenged flow control ordinances required local garbage haulers to buy processing or disposal services from a local facility. In Babylon, local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage service to everyone in the

12. This is, of course, consistent with the Third Circuit's position: "We believe . . . that a local authority could choose a single provider — without impermissibly discriminating against interstate commerce — so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses." *Harvey & Harvey*, 68 F.3d at 802. Thus, even assuming the issue of the constitutionality of selecting a single provider through an open and non-discriminatory selection process were presented by the current petitions for certiorari — which it is not — there is no apparent conflict between the Third Circuit and other circuit courts which have addressed this.

> District. Although taxpayers in the District ultimately foot the bill for these garbage services . . . the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* required, and that rendered those ordinances discriminatory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone*.

Babylon, 66 F.3d at 1283 (citations omitted).

Likewise, any conflicts, real or imagined, with any district court decisions, in this or any other circuit, involving other solid waste systems will not justify the granting of certiorari here. For it is the duty of the courts of appeals, and not the Supreme Court, to maintain uniformity within their own circuits and to supervise decisions of their subordinate district courts. *Supreme Court Practice* at 178.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

MARK R. ROSEN
Counsel of Record
MESIROV GELMAN JAFFE
CRAMER & JAMIESON
Attorneys for Respondent
Atlantic Coast Demolition
& Recycling, Inc.
Woodcrest Pavilion
Ten Melrose Avenue
Cherry Hill, NJ 08003-3647
(609) 795-4988

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Supreme Court of the United States

October Term, 1997

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, et al.,

Petitioners,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

DECOTIIS, FITZPATRICK & GLUCK
Attorneys for Petitioners
Essex County Utilities Authority
Hudson County Improvement Authority
Mercer County Improvement Authority
Passaic County Utilities Authority
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
(201) 928-1100

J. SHELDON COHEN
Of Counsel

BENJAMIN CLARKE
J. SHELDON COHEN*
On the Brief

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

POINT I

THIS CASE RAISES AND TURNS ON AN IMPORTANT CONTRADICTION IN THE COURT'S COMMERCE CLAUSE JURISPRUDENCE, AND WARRANTS REVIEW BY THE COURT.

Respondents Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") and C & A Carbone, Inc. ("Carbone") unitedly deny that the decision below reveals a conflict between the Court's decisions in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and *General Motors Corp. v. Tracy*, 117 S.Ct. 811 (1997). The disparate results in those cases, respondents assert, are attributable to a simple "factual" distinction (Atlantic Coast Brief at 14; Carbone Brief at 8).

The "factual" distinction to which respondents refer is precisely this: the solid waste ordinance at issue in *Carbone* was found to be discriminatory under the dormant Commerce Clause, while the utility tax exemption at issue in *Tracy* was found not to be discriminatory. As is clear on a moment's thought, this is not a "factual" distinction at all; rather, it is a mere description of the different legal outcomes of the two cases.

The Court's opinion in *Tracy* leaves no doubt that the pivotal factor in that case was that it involved a State's exercise of its utility regulation powers – as does this case. The Third Circuit, speaking without the benefit of the Court's decision in *Tracy*, mistakenly concluded that the Commerce Clause principles set forth in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951), were defunct, and therefore failed to

give any weight or consideration to the utility underpinnings of New Jersey's solid waste program. In so doing, the lower court misapplied this Court's precedents, which have consistently recognized the need to balance and preserve traditional State sovereignty over utilities against countervailing considerations of interstate commerce.

From any constitutional perspective, the weight attaching to, and the deference owed, a state-controlled solid waste utility system clearly exceed the weight attaching to, and deference owed, a solitary municipal wasteflow ordinance. Preemption of an entire relevant market by State certification of regulated utilities providing essential bundled services to all state residents is not the same thing, or close to the same thing, as a municipal ordinance establishing and protecting a local monopoly over services generally provided through the open market.

If, as the Third Circuit held, *Carbone* treats those two very different things as constitutional equals, then the decision is unsound, and should be reconsidered in light of *Tracy*. If, on the other hand, the Third Circuit was wrong in holding that *Carbone* controls in a case involving a State utility system bearing marked similarities to those upheld in *Panhandle* and *Tracy*, then, as Petitioners have previously stated, the citizens of New Jersey have been dealt a judicial error of mammoth proportions.

The tension between *Tracy* and *Carbone* revealed by the decision below is of sufficient consequence locally, nationally, and doctrinally to warrant the Court's attention. The social impact of the decision below, and the

dislocations that will follow from it, are too severe to let pass in error. A writ of certiorari should accordingly issue.

POINT II

NATIONALLY SIGNIFICANT CONFLICTS REGARDING THE MEANING AND SCOPE OF *CARBONE* EXIST AND SHOULD BE RESOLVED BY GRANT OF CERTIORARI.

Respondents do not deny that lower federal courts throughout the country have issued, and continue to issue, inconsistent decisions regarding the meaning and scope of the Court's decision in *Carbone*. Rather, they assert that the burgeoning balkanization of the law in this area furnishes no reason for this Court to exercise its review powers because, for the most part, the Circuit Courts of Appeals have managed to reach their irreconcilable conclusions without expressly disagreeing with one another. *But see SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996) (acknowledging a conflict between the Second Circuit and Eleventh Circuit over the applicability of the market participant doctrine to solid waste regulations).

Sweeping aside any consideration of the social cost of the legal disarray, respondent Atlantic Coast instead reminds the Court that "it is the duty of the courts of appeals, and not the Supreme Court, to maintain uniformity within their own circuits." (Atlantic Coast Brief at 22). In a case arising under the dormant Commerce Clause, respondents' invocation of "uniformity within a circuit" is ironic, if not oxymoronic. Inconsistent federal

court decisions are as destructive of a seamless national market as crazy-quilt state regulations – with one legally substantial difference: under our Constitution, state regulations are expected to be diverse, while federal law is *supposed* to be uniform.

Respondents may be untroubled by the spectacle of lower federal courts unpredictably upholding and striking down state solid waste programs in the name of national uniformity, but the Court should not share that indifference. If a national market for solid waste disposal is the goal, then the extent to which a State retains its police powers over that commercial activity should not, and indeed must not, vary from district to district and circuit to circuit, let alone vary wildly, as it does now. Exercise of this Court's supervisory powers is thus warranted, and is urgently needed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

DeCotiis, Fitzpatrick & Gluck
Attorneys for Petitioners

By: J. Sheldon Cohen
Benjamin Clarke